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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1983

PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

VS.

WALTER McCOVEY, JR., and LANCE R. WILKIE,
Respondents.

On Writ of Certiorari to the California Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether California can prohibit Indian commercial fishing in a navigable river lying within the perimeter boundaries of an executive order Indian reservation created long after California's admission to statehood, where the fish taken are sold far from the reservation.

II. Whether regulations adopted by the Secretary of the Interior prohibiting on-reservation Indian commercial fishing preempt nondiscriminatory California laws prohibiting off-reservation commercial fish sales, and, if so, whether Congress has delegated authority to the Secretary to adopt such regulations.

LIST OF PARTIES

The petitioner and respondents are listed on the face of the petition for writ of certiorari.

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OPINIONS BELOW

The decision of the California Supreme Court is reported at 36 Cal.3d 517, and is set forth at Appendix 1-25. The decision of the California Court of Appeal is reported at 145 Cal.App.3d 190, and is set forth at Appendix 26-39.

JURISDICTIONAL GROUNDS

The decision of the California Supreme Court was filed and entered on July 26, 1984. A petition for rehearing was filed by the petitioner on August 1, 1984, and denied on August 22, 1984. Pet. App. 40. The decision of the California Supreme Court is now final.

This Court has jurisdiction to review the lower decision by writ of certiorari under 28 U.S.C. § 1257(3).

APPLICABLE FEDERAL LAWS

1. Presidential Executive Order, October 14, 1891:

> "It is hereby ordered that the limits of the Hoopa Valley Reservation in the State of California, a reservation duly set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in said State, by Act of Congress approved April 18, 1864, (13 Stats., 39), be and the same are hereby extended so as to include a tract of country one mile in width on each side of the Klamath River, and extending from the present limits of the said Hoopa Valley reservation to the Pacific Ocean; *Provided, however,* That any tract or tracts included within the above described boundaries to which valid rights have attached under the laws of the United States are hereby excluded from the reservation as hereby extended.
>
> BENJ. HARRISON."

1 Kappler, *Indian Affairs: Laws and Treaties* 815.

2. Public Law 280, 67 Stats. 588, 18 U.S.C. § 1162:

§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country:

"(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory.

* * * * * * *

"California. . . . All Indian country within the State.

* * * * * * *

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to an Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."

STATEMENT OF THE CASE

1. Nature of the Controversy

In September 1980 the respondents, using gill nets, caught a large quantity of salmon in the lower Klamath River in

northern California. Pet. App. 2. They sold the fish in San Jose, a large city located several hundred miles from the reservation. *Id.* They were arrested by California authorities for violating section 8685.6 of the California Fish and Game Code, which prohibits the sale of salmon taken by the use of gill nets. Pet. App. 3. Both respondents are Indians. Pet. App. 2. Under California law, the lower Klamath River is a navigable waterway. Cal. Harbors & Nav. Code § 103; Cal. Exh. 23, at 24 (Pet. App. 58).

This Court has held that the lands adjacent to the lower Klamath River are part of an Indian reservation, see *Mattz v. Arnett,* 412 U.S. 481 (1973)[1], but has expressly refrained from determining whether the river itself is included within the reservation. See *Donnelly v. United States,* 228 U.S. 243, *rehearing granted,* 228 U.S. 708 (1913). The reservation was created by an 1891 presidential executive order, which provided that the reservation includes a "tract of country one mile in width on each side of the Klamath River." 1 Kappler, *Indian Affairs: Laws and Treaties* 815 (hereinafter "Kappler") (emphasis added). The executive order was originally proposed and drafted by the Secretary of the Interior, who, in forwarding the proposed order to the President for signature, attached an 1891 opinion of the United States Attorney General as the basis for the proposed order; the Attorney General opinion declared that California acquired sovereign control of its navigable waters upon admission to statehood in 1850, and thus that "the Klamath River is not within the Indian country nor the Indian reservation of 'one mile in width on each side' thereof." Cal. Exh. 23, at 26 (Pet. App. 59).

The State of California has, throughout this century, vigorously regulated the salmon fishery in the lower Klamath River. After the fishery was almost destroyed by

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[1] In *Mattz,* this Court held that an 1892 homestead entry act did not terminate the reservation. The Court did not reach the issues, raised here, whether the reservation includes the river or whether the Indians have the right to sell fish off the reservation.

commercial fishing in the early 1930's, California prohibited further commercial fishing in the river. Cal. Fish & Game Code § 8434. The prohibition has remained in effect to the present time, and has been applied uniformly against Indian and non-Indian fishermen. Until this Court's decision in *Mattz v. Arnett, supra,* 412 U.S. 481, the Secretary of the Interior never objected to California's regulation of the fishery, and the Indian community fully complied with it. After *Mattz*—which this court recently declared to be of doubtful validity[2]—California's regulatory authority over the fishery has become less certain, but California continues to exercise regulatory authority over the fishery and believes that it has authority to do so.

In 1977, the Secretary of the Interior adopted regulations governing Indian fishing in the lower Klamath River. 25 CFR §§ 250.1-250.18.[3] The regulations originally—and over California's objections—authorized Indian commercial fishing, but were changed to prohibit commercial fishing after

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[2]In *Puyallup Tribe, Inc. v. Department of Game,* 433 U.S. 165, 173 n.11 (1977), this Court declared that *Mattz* may no longer be good law after *DeCoteau v. District County Court,* 420 U.S. 425 (1975), and *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977).

[3]The regulations permit fishing for "subsistence and ceremonial purposes only," 25 CFR § 250.8(d); specify the types and sizes of nets that may be used and the locations where they may be used, *id.* at § 250.8(b), (c), (g)-(n), (p), (r), (s), & (t); authorize use of gill nets only on certain days, and during specified hours, *id.* at § 250.8(b), (c); require particular markings to be made on fish taken, *id.* at § 250.9(a); and limit the quantity of fish that may be transported off the reservation without a special permit, *id.* at § 250.9(b). The regulations also require Indian fishermen to obtain and possess an identification card. *Id.* at §§ 250.1(c), 250.5, 250.6. Federal, tribal and deputized officers are authorized to enforce the regulations by making arrests, seizing fishing gear, and issuing citations. *Id.* at §§ 250.4, 250.14. Indians who violate the regulations are subject to prosecution before a tribal court. *Id.* at §§ 250.14, 250.15. The regulations specifically prohibit "commercial fishing," *id.* at § 250.8(e), and provide that fish taken "may not be sold." *Id.* at § 250.8(f).

it became clear that such fishing was threatening to destroy the resource. 25 CFR § 250.8(e). Thus, both the federal regulations and California law now prohibit Indian commercial fishing. In January 1982, the Solicitor of the Department of the Interior issued a memorandum authorizing the U.S. Fish and Wildlife Service "to aid state officials in the prosecution of the alleged violations committed by the concerned individuals" with respect to Klamath River commercial fishing, and to "assist the States [of California and Oregon] by referring matters for possible prosecution, providing evidence and appearing as witnesses as the States may request." Cal. Exh. 30, p. 2 (Pet. App. 64). The Solicitor's memorandum also noted that the Indians' fishing rights "do not presently include the commercial sale of fish caught within reservation boundaries." *Id.*

The Yurok tribe is not an organized tribe, and has no policy with respect to commercial fishing by its members. The U.S. Bureau of Indian Affairs noted in 1978, shortly after the federal regulations were adopted, that "a majority of the Indian people on the reservation appear to be opposed to permitting commercial fishing." U.S. Bureau of Indian Affairs, "Environmental Assessment," at 33 (June 14, 1978).

2. The Proceedings Below

In the trial court proceeding, the respondents moved to dismiss the criminal complaint on grounds that California lacks jurisdiction to prohibit off-reservation fish sales by Indians. The court denied the motion, ruling that California law applies to off-reservation Indian conduct. Sitting without a jury, the court convicted the respondents for violating section 8685.6 of the California Fish and Game Code, which prohibits sales of salmon taken by the use of gill nets.

The respondents appealed their convictions to the Court of Appeal, which consolidated the case with seven other cases involving Indian commercial fishermen, all of whom had filed original petitions for writs of prohibition in the

Court of Appeal to restrain further criminal proceedings against them. California made the following four arguments in all eight consolidated cases:

> (1) California acquired sovereign control of the lower Klamath River under the Equal Footing Doctrine, and thus has the right to regulate Indian commercial fishing in the river;
>
> (2) The presidential executive order creating the reservation was based on the United States Attorney General's 1891 opinion declaring that the reservation cannot lawfully include the river, and thus the river is not part of the reservation;
>
> (3) Public Law 280 authorizes California to regulate Indian commercial fishing; and
>
> (4) In any event, California has the right to regulate off-reservation sales of fish by Indian fishermen.

The appellate tribunal upheld California's fourth argument, ruling that California law applies to off-reservation Indian conduct. Pet. App. 32-34. The tribunal expressly refrained from reaching California's first three arguments. Pet. App. 34-36. The tribunal affirmed the respondents' convictions and dismissed the petitions for writs of prohibition filed by the seven other petitioners. Pet. App. 39.

The California Supreme Court granted petitions for hearing filed by the respondents and the seven other petitioners. The cases were briefed and argued simultaneously. The Supreme Court reversed respondent McCovey's conviction.[4] For reasons that are unclear, the Supreme Court did not decide the seven other cases involving original petitions for writs of prohibition, and these cases are still pending.

In reversing McCovey's conviction, the Supreme Court rejected California's fourth argument—pertaining to off-

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[4]Respondent Wilkie's conviction was affirmed on grounds that he is not an Indian of the Hoopa Valley Reservation. Pet. App. 23-24.

reservation sales—on grounds that the federal regulations preempt California law. Pet. App. 7-20. The Court also rejected California's third argument, pertaining to Public Law 280. Pet. App. 22-23. *Inexplicably, the Court did not consider or even mention California's first and second arguments, pertaining to the Equal Footing Doctrine and the reservation status of the river.*[5] Also, the Supreme Court failed to rule on California's motion requesting that the Court take judicial notice of various official reports, including the U.S. Attorney General's 1891 opinion declaring that California has sovereign control of the river and thus the reservation does not include the river.

California filed a petition for rehearing, reminding the Supreme Court that it had (1) failed to consider or even mention California's first two arguments pertaining to the equal footing and river ownership questions; (2) failed to decide the seven other pending cases involving original petitions for writs of prohibition; and (3) failed to rule on California's motion requesting the Court to take judicial notice of certain official documents. The petition for rehearing was denied without comment. Pet. App. 40.

Respondent McCovey's conviction cannot be overturned without rejection of California's first two arguments—pertaining to the equal footing and river ownership questions—since the federal regulations cannot lawfully preempt California law if California has sovereign control of the river or if the reservation does not include the river. Therefore, the California Supreme Court, in reversing the conviction, necessarily and impliedly rejected California's

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[5]It cannot be suggested that the Supreme Court was unaware of California's first two arguments. These arguments were set forth as the first two arguments in California's briefs before the Court of Appeal and before the Supreme Court, and received the most attention during oral argument before the Supreme Court. To show the extent to which California raised these arguments before both courts, copies of California's three briefs before the two courts have been lodged with the Clerk of this Court.

first two arguments. Moreover, California fully raised these two arguments before both the Supreme Court and the Court of Appeal. These issues are thus ripe for review by this Court. Indeed, since the two issues are jurisdictional—in that they relate to whether the State or federal government has sovereign control of the river—they can be raised at any stage of the proceedings.[6]

ARGUMENT

INTRODUCTION

The California Supreme Court decision radically departs from three deeply-ingrained principles of federal law established by this Court. First, this Court has consistently held that, under the Equal Footing Doctrine, the states acquire sovereign control of navigable waters upon admission to statehood. The only limitation is that state powers are subject to federal conveyances of proprietary rights made during the *pre-statehood* period, a limitation which provides the basis of Indian fishing rights in most western states. The limitation does not apply here because the Indian reservation in question was created *after*, rather than before, California's admission to statehood. Indeed, the U. S. Attorney General issued an opinion in 1891 declaring, *with respect to the very reservation involved here*, that California acquired sovereign control of the Klamath River upon admission to statehood, and thus the reservation cannot include the river. The lower decision makes no reference to the Attorney General opinion, or even the scope of California's sovereign powers under the Equal Footing Doctrine. By holding that California cannot prohibit Indian commercial fishing here, the lower decision departs from

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[6]The respondents argued below that California had improperly failed to raise these two arguments during the trial court proceeding, and had raised them initially during the Court of Appeal proceeding. Since the arguments are jurisdictional, however, they can clearly be raised at any stage of the proceeding. See, e.g., *United States v. California*, 332 U.S. 19, 39-40 (1947).

this Court's past decisions holding that the federal government cannot convey proprietary interests in navigable waters during the post-statehood period.

Second, this Court has consistently held that "surrounding circumstances" must be considered in determining the boundaries and purposes of Indian reservations. The "surrounding circumstances" here indicate that the President, in issuing the executive order creating the reservation, relied on the 1891 Attorney General opinion declaring that the reservation cannot lawfully include the river. Thus, the President did not intend to abridge California's sovereign interests in the river, apart from the fact that he lacks constitutional power to do so. The lower decision ignores these and all other "surrounding circumstances," and instead concludes as a matter of law that the creation of an Indian reservation necessarily carries with it the right to fish in violation of state laws.

Third, this Court has consistently held that nondiscriminatory state laws are applicable to *off*-reservation Indian conduct unless Congress *expressly* preempts such state laws. Congress has not, expressly or otherwise, preempted California laws applicable to off-reservation Indian fish sales here. Further, contrary to the lower decision, the Secretary of the Interior's regulations governing Indian fishing do not have a preemptive effect. The Secretary's regulations are fully compatible with California law, because both *prohibit* all forms of Indian commercial fishing. Indeed, the Secretary has authorized federal agencies to fully assist and cooperate with State officials who arrest and prosecute Klamath River Indian fishermen for violations of State law. Thus, the Secretary, who promulgated the regulations, clearly does not regard them as having a preemptive effect. The lower decision, in concluding otherwise, makes no reference whatsoever to the Secretary's actual practice in administering his own regulations, and departs from this Court's past decisions holding that state laws generally apply to off-reservation Indian conduct.

It is thus clear that this case raises several significant issues that were wrongly decided below. The case raises issues concerning the relationship of state and federal power over navigable waters under the Equal Footing Doctrine. It raises issues concerning federal authority to convey proprietary interests in such waters during the post-statehood period. It raises issues concerning state authority over off-reservation Indian conduct. It raises questions whether the President—in creating the reservation—meant to abridge California's sovereign interests in the river; whether the Secretary—in adopting his regulations—meant to abridge California's right to control off-reservation conduct; and whether the Secretary has the lawful power to abridge California's sovereign interests in the absence of express congressional authorization. None of these important questions has ever been decided by this Court. All, we submit, are worthy of this Court's immediate attention.

Finally, the issues presented here have implications that reach beyond this case. Many states, particularly in the western region, were admitted to statehood prior to the adoption of federal treaties or statutes creating Indian reservations in such states.[7] The rights of such states to regulate navigable waters traversing Indian reservations are at stake here. Although the reservation involved in this case was created by executive order rather than by treaty or statute, the underlying principle is the same regardless of the form of the reservation's creation. This principle therefore extends to all states that were admitted to state-

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[7]To provide a few examples, the following chart compares the admission dates of some western states with the dates that some reservations were created in the states:

(Footnote continued, next page)

hood prior to the creation of Indian reservations, and is not confined to California.[8]

(Footnote continued from preceding page)

State	Admission Date	Reservation	Reservation Date
1. Arizona	1912 (37 Stat. 1728)	Colorado River	1915
		Cocopah	1917
		Kabab	1917
		Navajo	1922
		San Carlos	1931
	4 Kappler 1001-1012, 5 Kappler 656-657		
2. Colorado	1876 (19 Stat. 665)	Ute	1915
		Ute	1938
	4 Kappler 1017, 5 Kappler 659-660		
3. Nevada	1864 (13 Stat. 32)	Walker	1924
		Shoshone	1918
		Paiute	1918
		Winnemuca	1917
	4 Kappler 1027-1029		
4. New Mexico	1912 (37 Stat. 1728)	Jicarilla Apache	1913
		Jemez Pueblo	1915
		Laguna Pueblo	1917
		Zia Pueblo	1920
	4 Kappler 1029-1032		
5. Utah	1896 (29 Stat.876)	Goshute	1914
		Paiute	1915
		Shebit	1916
		Utah Bands	1923
		General reservation for Indian benefit	1927
	4 Kappler 1048-1050		

[8]This principle is particularly significant in California. Ever since *Mattz v. Arnett, supra*, 412 U.S. 481, California's regulatory authority over the Klamath River fishery has been unclear, and many Indian commercial fishermen have taken advantage of the lack of clarity by violating California laws even as applied to off-reservation fish sales. The lack of clarity was heightened by the Secretary of the Interior's regulations, adopted in 1977, which generally prohibit Indian commercial fishing. Indeed, several other cases are now pending before the California Supreme Court which raise the same issues presented here, see pages 5-7, *supra*, and many other such cases are pending before other lower courts in California.

I

CALIFORNIA HAS SOVEREIGN POWER UNDER THE EQUAL FOOTING DOCTRINE TO REGULATE FISHERIES IN NAVIGABLE WATERS WITH RESPECT TO INDIAN RESERVATIONS CREATED AFTER CALIFORNIA'S ADMISSION TO STATEHOOD

If, as the California Supreme Court held, the Secretary of the Interior's regulations are intended to preempt California laws, the Secretary's regulations violate California's sovereign rights under the Equal Footing Doctrine, which provides a constitutional basis for California to regulate Indian commercial fishing here. Under the Equal Footing Doctrine, California and other western states acquired sovereign control of navigable waters and underlying lands upon admission to statehood. See, *e.g., Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 229 (1845); *Shively v. Bowlby*, 152 U.S. 1, 49-50 (1894); *United States v. Oregon*, 295 U.S. 1, 14 (1935). Under California law, the Klamath River is a navigable waterway. Cal. Harbors & Nav. Code § 103. Indeed, the U. S. Attorney General declared in 1891 that the Klamath River was a "navigable stream" and hence within California's jurisdiction under the Equal Footing Doctrine. Cal. Exh. 23, at 24 (Pet. App. 58); Sen. Exec. Doc. No. 140, 50th Cong., 2d Sess., at 13-14 (1889). The Equal Footing Doctrine is of constitutional origin, for it recognizes the states' sovereign interests in navigable waters and underlying lands. *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977); *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 434-435 (1892). The doctrine applies to the navigable waters themselves, not just the underlying beds. *California v. United States*, 438 U.S. 645, 655 (1978).

This Court has held that state rights in navigable waters and underlying beds under the Equal Footing Doctrine are subject to conveyances of proprietary interests by the federal government during the *pre-statehood* period. See *Montana v. United States*, 450 U.S. 544, 551-552 (1981); *United*

States v. Holt State Bank, 270 U.S. 49, 54-55 (1926); *Chocktaw Nations v. Oklahoma*, 397 U.S. 620 (1970). There is, however, a strong presumption against such conveyances. *Montana*, 450 U.S. at 552. Even so, this Court has held that Indian fishing rights granted by pre-statehood treaties cannot be abridged by state law. *United States v. Winans*, 198 U.S. 371, 383 (1905). Hence, Indian fishing rights granted by pre-statehood treaties survive the sovereign powers acquired by the states under the Equal Footing Doctrine. As the Court noted in *Winans*, this exception provides the basis for Indian fishing rights in most western states, as in *Winans* itself. 198 U.S. at 383.

This exception, however, does not apply here. California was admitted to statehood in 1850. California Admission Act, 9 Stat. 452 (1850). The Indian reservation in this case was created by presidential executive order in 1891, 1 Kappler 815, after California's admission to statehood. Therefore, the federal government lacked constitutional power to grant Indian commercial fishing rights here, even assuming that it meant to do so.[9] See *Montana*, 450 U.S. at 551-552. The constitutional basis that underlies Indian fishing rights in other states does not exist here. By holding otherwise, the California Supreme Court ignored the long-standing principles espoused in *Montana* and its antecedents.[10]

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[9]As we explain in the next argument, the presidential executive order creating the reservation here was not intended to grant Indian commercial fishing rights, because the order was based on a U.S. Attorney General opinion declaring that the reservation cannot lawfully include the river.

[10]The only other possible constitutional basis for sustaining Indian commercial fishing rights here would be by extension of the reserved rights doctrine to this case. Under this doctrine, the federal government presumptively "reserves" water rights as necessary to satisfy the purposes of reserved federal lands. See *Cappaert v. United States*, 426 U.S. 128, 138-142 (1976); *Arizona v. California*, 373 U.S. 546, 595-601 (1963); *Winters v. United States*, 307 U.S.

(Footnote continued, next page)

The above Equal Footing analysis is supported by an opinion rendered by the U.S. Attorney General in 1891, declaring that California acquired sovereign control of the Klamath River upon admission to statehood and thus the reservation cannot lawfully include the river. According to the Attorney General opinion:

> "California was admitted into the Union on September 9, 1850, and thereupon 'absolute property in, and dominion and sovereignty over, all soils under the tide waters within her limits passed to the State,' subject to the paramount right of navigation. [Citation omitted.] In like manner the States own the the tide waters and the fish therein, for use of its citizens. [Citations omitted.] It results therefore, that the executive order of November 16, 1855, establishing the Klamath River reservation, if it had so declared, would have been ineffective to include the bed and waters of that river as part of the Indian reservation." Cal. Exh. 23, at 25 (Pet. App. 58-59).

The Attorney General concluded:

> "[T]he Klamath River is not within the Indian country nor the Indian reservation of 'one mile in width on each side' thereof. . . ." *Id.* at 26 (Pet. App. 59).

The Attorney General noted that he had drawn an identical conclusion in an earlier 1887 opinion. Cal. Exh. 23, at 25 (Pet.App. 59); Sen. Exec. Doc. No. 140, 50th Cong., 2nd

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(Footnote continued)

564 (1908). This Court has consistently held, however, that the reserved rights doctrine applies only to federal or Indian *water* rights, and has never extended the doctrine to include Indian *fishing* rights where water rights were not in question. See, e.g., *Cappaert*, 426 U.S. at 138; *Winters*, 307 U.S. 564. Moreover, if the doctrine were extended here, the federal government would have the power to "reserve" proprietary non-water right interests which cannot, under the line of authority culminating in *Montana*, be "conveyed" during the post-statehood period. The doctrine, so extended, would thus conflict with limitations on the federal power to make post-statehood conveyances. Hence, the logic of the reserved rights doctrine does not permit its extension here.

Sess., at 13-14 (1889). In the earlier opinion, the Attorney General concluded that "the Klamath River being a navigable stream," California owns the river subject to the federal power to regulate navigation. The earlier opinion declared:

> "The States own the tide-waters themselves and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty. [Citation omitted.] The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States. *There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the State,* which has consequently the right, in its discretion, to appropriate its tidewaters and their beds, to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation." *Id.* (emphasis added).

It is thus clear that California has sovereign control of the Klamath River under the Equal Footing Doctrine, and has the concomitant right to regulate and prohibit Indian commercial fishing. Although the California Supreme Court decision inexplicably fails to consider California's arguments that it has such sovereign control, the decision—in holding that California cannot prohibit Indian commercial fishing here—simply lacks a constitutional or jurisdictional basis.

II

THE "SURROUNDING CIRCUMSTANCES" INDICATE THAT THE RESERVATION DOES NOT INCLUDE THE RIVER

This Court has held that "surrounding circumstances" must be consulted in determining the boundaries and purposes of Indian reservations. See *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 587 (1977); *Mattz v. Arnett, supra,*

412 U.S. at 505. The California Supreme Court decision, however, does not consult the "surrounding circumstances" relating to the reservation here. Instead, the decision simply concludes, without analysis and apparently as a universal proposition of law, that "it is well established that the creation of a reservation for Indian purposes encompasses the right to fish on the reservation." Pet. App. 21 n. 22.

The "surrounding circumstances" here, which were not even considered in the lower decision, indicate that the presidential executive order creating the reservation did not intend to include the river in the reservation, or to exclude the application of California law to Indian fishermen. The reservation was originally created by presidential executive order in 1855. 1 Kappler 817. In 1888, a federal district court in California ruled that the reservation had ceased to exist, and the decision was affirmed on appeal. See *United States v. Forty Eight Pounds of Rising Star Tea,* 35 Fed. 403 (N.D. Cal. 1888), *aff'd,* 38 Fed. 400 (CCND Cal. 1889). The Secretary of the Interior then decided to create a new reservation to replace the former one. He asked the U. S. Attorney General for an opinion concerning the legality of extending an upstream reservation—commonly known as the Hoopa Valley Reservation—to include the lands occupied by the former reservation. The U. S. Attorney General, in the opinion described earlier, issued an opinion in 1891 declaring that (1) the upstream reservation can be lawfully extended to include the former downstream reservation, but (2) the reservation as extended cannot include the river, because California acquired sovereign control of the river under the Equal Footing Doctrine. Cal. Exh. 23, at 25-29 (Pet. App. 58-59).

The Secretary of the Interior then drafted a proposed executive order creating an extended reservation, and, pursuant to the Attorney General opinion, inserted language limiting the reservation to "one mile in width on each side" of the river. The Secretary forwarded the proposed order to the President for signature, and attached the Attorney

General opinion as setting forth "the reason for the issuance of the order in the premises." Cal. Exh. 31(c). The President signed the order as proposed. Therefore, the executive order, by its own terms and as explained by "surrounding circumstances," unequivocally shows that the reservation does not include the river. California thus has the sovereign right to regulate Indian fishing in the river.

These historical circumstances are relevant here in two different ways. First, they show that the U. S. Attorney General in 1891 supported California's *constitutional* argument that California acquired sovereign control of the river upon admission to statehood, and hence has the right to regulate Indian fishing. Second, they show that the presidential executive order creating the reservation did not *intend* to include the river in the reservation, or to abridge California's sovereign rights in the river. These historical circumstances support both California's constitutional argument and its interpretational one. The California Supreme Court decision makes no reference whatsoever to these historical circumstances in rejecting California's position here.

III

CALIFORNIA HAS THE RIGHT TO REGULATE AND PROHIBIT OFF-RESERVATION SALES OF FISH BY INDIAN FISHERMEN[11]

This Court has consistently distinguished between on-reservation and off-reservation conduct of Indians in determining the applicability of state laws to them. With respect to *on*-reservation conduct, the Court undertakes a "particularized inquiry into the nature of the state, federal, and tribal interests at stake." *Rice v. Rehner,* ..... U.S. ....., 77 L.Ed.2d 961, 169 (1983), quoting from *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 145 (1980). In effect,

[11]This argument assumes *arguendo* that the reservation in this case includes the Klamath River, and that California law is not applicable to Indians who commercially fish in the river.

this Court balances the competing interests. Under this balancing test, state law is presumptively not applicable to on-reservation Indian conduct. See, *e.g.*, *Rice*, 77 L.Ed.2d at 969.

With respect to *off*-reservation conduct, however, this Court has consistently held that nondiscriminatory state laws fully apply to Indians unless contrary to "express" federal law. See *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149 (1973); *New Mexico v. Mescalero Apache Tribe*, ... U.S. ....., 103 S.Ct. 2378, 2387 n. 18; *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 n. 11 (1980); *Ward v. Race Horse*, 163 U.S. 504 (1896). In *Jones*, this Court declared:

> "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the state." 411 U.S. at 148-149.

Thus, although state law presumptively does not apply to on-reservation conduct, the presumption shifts where off-reservation conduct is involved. The distinction reflects an apparent assumption that Indians should be largely free of state laws when on the reservation, but must fully comply with such laws when they leave the reservation. The distinction comports with the "accommodation" of state, federal, and tribal interests which this Court recently declared to be the essence of modern federal Indian law. See *Washington v. Confederated Tribes*, 447 U.S. 134, 156 (1980).

This case involves off-reservation Indian conduct, for the respondents were arrested and prosecuted for selling fish far from the reservation. Further, federal law does not conflict with California laws prohibiting off-reservation sales, because the Secretary's regulations *prohibit* all forms of Indian commercial fishing. Nonetheless, the

California Supreme Court held that California law is preempted here. First, the lower Court, rather than presuming that State law applies to off-reservation Indian conduct, invoked the balancing test adopted by this Court in on-reservation cases. Then the Court, putting aside the fact that the Secretary's regulations do not conflict with State law, held that the Secretary's regulations comprehensively regulate the subject matter, thus leaving no room for State law. In effect, although this Court has always held that state laws are presumptively applicable to off-reservation Indian conduct, the lower Court held that State laws do not apply to off-reservation conduct here.

Apart from the fact that the lower Court failed to properly distinguish between on-reservation and off-reservation conduct, the lower Court struck the wrong balance between federal and State interests for two different reasons. First, the federal regulations were clearly not intended to preempt California laws prohibiting off-reservation sales. The federal regulations are fully compatible with California law, for both prohibit all forms of Indian commercial fishing. No conflict between federal and State law exists here. In the face of harmonious federal and State regulatory schemes, the courts should not willingly assume that federal law ousts State law, particularly where off-reservation Indian conduct is concerned. Indeed, the Secretary of the Interior has authorized federal agencies to fully assist and cooperate with State officials who arrest and prosecute Klamath River Indian fishermen for violations of State laws. Cal. Exh. 20, at 2 (Pet. App. 64). The Secretary has also authorized federal agencies to provide all relevant evidence to State authorities, and to appear as witnesses in State court proceedings. *Id.* It is thus clear that the Secretary, who adopted the regulations, does not regard them as having a preemptive effect.

Second, even assuming *arguendo* that the Secretary's regulations are intended to have a preemptive effect, the

Secretary lacks authority to preempt state laws pertaining to off-reservation Indian conduct unless Congress clearly grants such authority to him. *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 103 (1949); *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962). A proper accommodation of state, federal, and tribal interests would allow state laws to be fully applied to Indians who leave the reservation unless Congress itself preempts such state laws, or at least clearly delegates such authority to the Secretary. The Secretary's delegated authority should be more strictly construed where off-reservation Indian conduct is concerned, because the balance between state and tribal interests is significantly different than where on-reservation conduct is concerned. Therefore, absent a clear congressional delegation of authority, the Secretary should not be deemed to have the power to override state laws pertaining to off-reservation conduct. See *Hynes*, 337 U.S. at 103.

Congress has not, directly or impliedly, authorized the Secretary to preempt California laws in this case. Congress has never approved any treaty with respect to California Indian tribes, see *Indians of California v. United States*, 98 Ct.Cl. 583, 585 (1942), nor statutorily authorized the Secretary to override California laws here. The only congressional involvement here consists of an 1864 act authorizing the President to create four reservations in California at unidentified locations for unidentified tribes. 13 Stat. 39 (1864). This act, pursuant to which the President created the reservation here, contains no suggestion that California cannot regulate and prohibit off-reservation fish sales. Therefore, the Secretary of the Interior lacked power to preempt California laws here, even assuming that he meant to do so.

Finally, as a matter of public policy, Indians should be fully subject to state laws pertaining to off-reservation conduct. The reservation system was established to provide Indians with a homeland where they can pursue traditional

ways of life. This system is inimical to the notion that Indians should be immune from state laws when they leave the reservation and enter the mainstream of non-Indian society. Assuming that respondent McCovey has the right to commercially fish on the reservation, he would have the concomitant right to sell fish on the reservation, and thus should not be allowed to sell fish at other locations in violation of State law. California has a strong interest in ensuring that its laws are uniformly applied to all citizens, Indians and non-Indians alike, everywhere in the State except on Indian reservations themselves. It is simply unfair that an Indian can violate California law by selling fish in San Jose, hundreds of miles from the reservation, but that a non-Indian cannot. California's interest in uniform application of law outweighs any competing interests favoring tribal immunity from California law.[12]

IV

PUBLIC LAW 280 AUTHORIZES CALIFORNIA TO REGULATE INDIAN COMMERCIAL FISHING IN THIS CASE

Public Law 280, 67 Stat. 588, 18 U.S.C. § 1162, authorizes California to exercise civil and criminal jurisdiction over Indian reservations and Indian conduct thereon.[13] The act excepts Indian fishings and hunting rights "afforded" under a "federal treaty, agreement of statute." 18 U.S.C.

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[12]Moreover, the tribal interest here does not favor immunity from California law. The Yurok Tribe, which is not organized, has not adopted any policy with respect to Indian commercial fishing. Also, "a majority of the Indian people on the reservation appear to be opposed to permitting commercial fishing." U.S. Bureau of Indian Affairs, "Environmental Assessment," at 33 (June 14, 1978).

[13]In *Bryan v. Itasca County*, 426 U.S. 373 (1976), this Court held that Public Law 280 does not authorize the application of certain state civil laws, such as tax laws, on Indian reservations. Since California laws prohibiting Indian commercial fishing are criminal in nature, the *Bryan* limitation does not apply here.

§ 1162(b). The exception does not apply here because the Indian reservation in question was created by presidential executive order, 1 Kappler 815, not by "federal treaty, agreement or statute." The legislative history indicates that the original bill excepted rights afforded under federal "law"—which clearly includes executive orders—but that the reference was changed to federal "statute" to make the exception as "precise and narrow as possible." Letter from Acting Secretary of the Interior to Chairman of House Committee on Interior and Insular Affairs, at 3, June 29, 1953 (Cal. Exh. 13).

The Commissioner of Indian Affairs contemporaneously concluded that the exception in Public Law 280 does not apply to asserted Indian fishing rights on the Klamath River because such rights are not "afforded" by a federal "treaty, agreement or statute." Letter from Area Director of U.S. Bureau of Indian Affairs to Tribal Councils and Committees, at 1, March 26, 1954 (Cal. Exh. 15). The Commissioner concluded:

> "[W]e must conclude that the jurisdiction of the State of California is applicable to hunting and fishing activities of the Indians on the Hoopa Valley Reservation to the same extent that such jurisdiction is applicable to all citizens of the State." *Id.*

The California Supreme Court decision makes no reference to the Commissioner's contemporaneous interpretation of Public Law 280. Instead, the decision concludes that, since the executive order was promulgated pursuant to statutory authority, the rights here are afforded under a federal "statute." Pet. App. 23. In fact, the statute pursuant to which the executive order was issued merely authorized the President to "set apart . . . not exceeding four tracts of land" within California for Indian purposes. 13 Stat. 39 (1864). Thus, this statute did not in any way "afford" Indian commercial fishing rights here. Such rights, even

assuming their existence, were afforded by executive order, not by statute. The exception in Public Law 280 does not apply here.

CONCLUSION

This case raises several significant federal issues that were wrongly decided below. The California Supreme Court decision seriously erodes the sovereign powers acquired by the states under the Equal Footing Doctrine. It severely impairs the states' rights to regulate off-reservation Indian conduct. It fails to consider substantial legal arguments that lead to an opposite result. The decision, in a word, embarks on a new course, one that lacks precedent, doctrinal integrity, or wisdom. This Court should accordingly grant the petition for writ of certiorari.

Respectfully submitted,

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(Appendice follows)

Appendix 1

In the Supreme Court of the
State of California

Crim. 23387
(Super. Ct.
No. 77139)

The People,
Plaintiff and Respondent,

v.

Walter McCovey, Jr., et al.,
Defendants and Appellants.

[Filed July 26, 1984]

Is the state preempted from regulating the off-reservation sale or possession for sale of fish caught by Hoopa Valley Reservation Indians on the reservation?

I.

Appellant, Walter McCovey, Jr., is a Yurok[1] Indian of the Hoopa Valley Reservation located in northern California. This reservation includes a one-mile strip of land on each side of the Klamath River from the river's mouth at the Pacific Ocean to its confluence with the Trinity River. At that point, the reservation widens to a 12-mile square. (See *post*, at pp. .....-.....*)[2]

[1]Yurok means "down the river." (Mattz v. Arnett (1973) 412 U.S. 481, 486.)

*Typed opn. at pp. 6-7.

[2]A map of the reservation, which was appended to the opinion in Mattz v. Arnett, *supra*, 412 U.S. 481, following page 506, is provided in the appendix to this opinion.

Sometime in September 1980, appellant McCovey caught with a gill net[3] a large quantity of salmon from the Klamath River on the Hoopa Valley Reservation. Shortly thereafter, McCovey telephoned a fish wholesaler in San Jose and offered to sell him the salmon.

After agreeing to locate a buyer for the salmon, the wholesaler learned that it was illegal to sell salmon which had been gill-netted from California waters. He called McCovey back, informed him that it was unlawful to sell the salmon, but agreed to see if another buyer would purchase the fish. The wholesaler then notified an officer of the California Department of Fish and Game about the telephone conversations with McCovey.

Working with a Fish and Game Department officer, the wholesaler contacted one of his customers who agreed to pose as a buyer for the salmon. The "buyer" telephoned McCovey and arranged a purchase of approximately 100 king salmon with a wholesale value of over $3,100. Arrangements were made to deliver the salmon to the wholesaler.

The following day, McCovey and his codefendant, Lance Wilkie, who is not an Indian of the Hoopa Valley Reservation,[4] delivered the salmon to the wholesaler. Both appellants were then arrested by Fish and Game Department officers.

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[3]A gill net is "a flat net suspended vertically in the water with meshes that allow the head of a fish to pass through or become entangled." (25 C.F.R. § 250.4.) When a fish gets caught in the net, it helplessly struggles to free itself. In the process, the net takes a band of scales off the fish leaving markings referred to as "gill net marks."

[4]Although it is not entirely clear from the record, it appears that Wilkie is an Indian of the McCaw Tribe which is located in the State of Washington.

McCovey and Wilkie were charged with a felony violation of Fish and Game Code section 8685.6[5] They were also charged with a violation of section 2002, which prohibits the possession of any fish taken in violation of any of the provisions of the Fish and Game Code, and with a conspiracy to violate section 2002.

Appellants moved to dismiss the charges under Penal Code section 995. The trial court granted the motion to dismiss the section 2002 counts, but denied it with respect to the section 8685.6 count. Following the submission of the case on the preliminary hearing transcript, the trial court found appellants guilty of violating section 8685.6. McCovey was fined $2,500 and placed on probation for three years on the condition that he serve ninety days in the county jail. Wilkie was fined $500 and placed on probation for one year.[6] McCovey and Wilkie appeal.

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[5]Section 8685.6 provides: "It is unlawful to sell or possess for sale any salmon, steelhead, or striped bass which were taken in California waters by the use of a gill net." That statute was enacted as urgency legislation, effective July 11, 1980. (Stats. 1980, ch. 393, § 2, p. 775.)

All statutory references are to the Fish and Game Code unless otherwise noted.

[6]At the time appellants violated section 8685.6, the maximum punishment for a violation of that section was imprisonment in the state prison or county jail for not more than one year, or a $5,000 fine, or both. (§ 12004, added by Stats. 1980, ch. 393, § 4, p. 775.) Section 12004 was subsequently amended to provide that if the value of the fish involved exceeds $400, the maximum punishment for violating section 8685.6 is a $10,000 fine, or imprisonment in state prison or county jail for not more than one year, or the revocation of any wholesale fish dealer's license issued pursuant to section 8040, or any combination of these penalties. If the value of the fish involved does not exceed $400, the maximum punishment is a $500 fine, or imprisonment in the county jail for six months, or both. (Stats. 1982, ch. 1079, § 2, p. 3907; Stats. 1983, ch. 1092, § 104, No. 6 Deering's Adv. Legis. Service, p. 893.)

Appellants present three principal, interrelated contentions. First, they argue that state prosecution of reservation Indians for off-reservation conduct involving fish caught on a reservation infringes upon the Indians' federally protected right to fish on the reservation. Next, they assert that Department of the Interior regulations which govern Indian fishing on the reservation preempt the state from prosecuting Hoopa Valley Reservation Indians for the off-reservation possession or sale of reservation-caught fish. Finally, they contend that section 8685.6 as applied to reservation Indians for sale of reservation-caught fish impermissibly discriminates against and burdens Indian commerce in violation of the federal Constitution. (U.S. Const., art. I, § 8, cl. 3.)

Appellant McCovey also maintains that the imposition of a felony sentence on a Hoopa Valley Reservation Indian for a violation of section 8685.6 constitutes cruel and/or unusual punishment in violation of the federal and state Constitutions. (U.S. Const., 8th Amend.; Cal. Const., art. I, § 17.) In addition, appellant Wilkie urges that if the state were without jurisdiction to prosecute McCovey, Wilkie's conviction should also be reversed.

II.

A brief history of the Hoopa Valley Reservation is useful to place this case in context.

Legislation passed by Congress in 1853 authorized the President "to make . . . reservations . . . in the State of California . . . for Indian purposes." (10 Stat. 238 (Mar. 3, 1853); see Mattz v. Arnett, *supra*, 412 U.S. at p. 487.) The Klamath River Reservation was established by executive

order two years later. (*Ibid.*) In 1864, Congress passed an act authorizing the President to set apart no more than four tracts of land in California "for the purposes of Indian reservations." (13 Stat. 40 (Apr. 8, 1864); see Mattz v. Arnett, *supra*, 412 U.S. at p. 489.) Pursuant to that act, the Hoopa Valley Reservation was formally set aside for Indian purposes by executive order in 1876. (*Id.*, at p. 490, fn. 9.)

In 1891, the reservation "was extended so as to include all land, one mile in width on each side of the [Klamath] river, from 'the present limits' of the [original] Hoopa Valley Reservation to the Pacific Ocean. The Klamath River Reservation, or what had been the reservation, thus was made part of the Hoopa Valley Reservation, as extended." (*Id.*, at p. 493; see also Elser v. Gill Net Number One (1966) 246 Cal.App.2d 30, 33-34 and Donnelly v. United States (1913) 228 U.S. 243, 253-259 for additional historical background on the establishment of the Hoopa Valley Reservation.)

Today, the Hoopa Valley Reservation consists of 3 sections: (1) the Old Klamath River Reservation, a 2-mile wide strip of land, 1 mile in width on each side of the Klamath River, which extends 20 miles inland from the mouth of the river on the Pacific Ocean; (2) the original Hoopa Valley Reservation, a 12-mile square area, containing approximately 89,000 acres, which lies on both sides of the Trinity River; and (3) a 30-mile strip along the Klamath River which connects (1) and (2). (See Arnett v. Five Gill Nets (1975) 48 Cal.App.3d 454, 456-458, cert. den. (1976) 425 U.S. 907; Elser v. Gill Net Number One, *supra*, 246 Cal.App.2d at pp. 33-34.)

In 1977, in order to fill the regulatory vacuum created by the lack of a tribal governing body, the Department of the

Interior (hereafter Department) promulgated interim regulations governing Klamath River fishing by Indians of the Hoopa Valley Reservation. (42 Fed.Reg. 40904-40905 (Aug. 12, 1977).) Those regulations expressly permitted limited commercial fishing. (*Id.*, at p. 40905, §§ 258.1(c), 258.5.) The preamble to the regulations promulgated a year later expressly recognized that the federally reserved Indian fishing right included the right to fish for commercial purposes. (43 Fed.Reg. 30048 (July 13, 1978).) However, as the preamble noted, the right was not absolute: "[T]he Indians must be allowed to fish commercially as long as statistics show that there can be effective conservation, with simultaneous regulation of other forms of fishing by all persons." (*Ibid.*)

In 1979, in light of decreased salmon runs, the Department promulgated new regulations which imposed a moratorium on commercial fishing and the sale of fish caught on the reservation.[7] (44 Fed.Reg. 17144-17151 (Mar. 20, 1979).) However, the Department reaffirmed the existence of the right to fish commercially and guaranteed that it could be exercised when salmon runs increased. (*Id.*, at p. 17146.) The 1979 moratorium remains in effect, having been re-

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[7]The Department recognized that the vast majority of Klamath River salmon (i.e., those who were born there and would presumably return to spawn if able) are taken by offshore ocean fishing and thus never reenter the river. It noted that no effective limitations had previously been imposed on such fishing by agencies having jurisdiction to do so (e.g., the Department of Commerce). A ban on commercial fishing by Indians, the Department concluded, was the only means by which it could ensure that a sufficient number of returning fish escaped to reach the spawning areas at the headwaters, thereby permitting conservation and perpetuation of the resource. (44 Fed.Reg. 17144 (Mar. 20, 1979).)

newed in successive versions of the regulations. (25 C.F.R. § 250.8(d), (e).)

III.

This court must decide whether California is preempted from regulating the off-reservation possession or sale of fish caught by Hoopa Valley Reservation Indians on the reservation.

"[T]here is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members." (White Mountain Apache Tribe v. Bracker (1980) 448 U.S. 136, 142 [hereafter *White Mountain Apache Tribe*].) However, the traditional notions of Indian self-government which are "deeply engrained in our jurisprudence" provide a crucial " 'backdrop' " in answering such a question. (*Id.*, at p. 143.)

The United States Supreme Court has cautioned that "[i]t must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government." (McClanahan v. Arizona State Tax Comm'n. (1973) 411 U.S. 164, 172.) The status of these tribes has been described as " ' "an anomalous one and of complex character," ' for despite their partial assimilation into American culture, the tribes have retained ' "a semi-independent position . . . not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations . . . ." ' " (*White Mountain Apache Tribe, supra,* 448 U.S. at p. 142.)

Congress, however, has broad power to regulate Indian tribes under the Indian Commerce Clause. Thus, "[t]he

right of tribal self-government is ultimately dependent on and subject to the broad power of Congress." (*White Mountain Apache Tribe, supra,* 448 U.S. at pp. 142-143.) This power, along with the tribes' semi-independent position, has "given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members." (*Id.,* at p. 142.) First, state authority may be preempted by federal law. Second, it may interfere with " 'the right of reservation Indians to make their own laws and be ruled by them.' " (*Ibid.,* quoting Williams v. Lee (1959) 358 U.S. 217, 220.) "The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members." (*White Mountain Apache Tribe, supra,* 448 U.S. at p. 143.)

The doctrine of preemption applies in a "special sense" to cases involving Indians and Indian tribes. (New Mexico v. Mescalero Apache Tribe (1983) ..... U.S. ....., ... [103 S.Ct. 2378, 2386].) "Although a State will certainly be without jurisdiction if its authority is preempted under familiar principles of preemption, . . . prior cases [do] not limit preemption of State laws affecting Indian tribes to only those circumstances." (*Ibid.*) In fact, the Supreme Court has noted that "[t]he unique historical origins of tribal sovereignty make it generally unhelpful" to apply preemption standards that have emerged in other areas of the law to cases where Indians are federally regulated. (*White Mountain Apache Tribe, supra,* 448 U.S. at p. 143.)

As the court has explained, "[t]ribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other."

(*Ibid.*) In addition, the court has rejected the proposition that Indian preemption requires "an express congressional statement to that effect." (*Id.*, at p. 144.) Rather, the Indian preemption question requires "a particularized inquiry into the nature of the state, federal, and tribal interests at stake." (*Id.*, at p. 145.)

The Indian preemption cases focus on the scope and the nature of federal regulation in the area. Where there exists a "pervasive" or "comprehensive" federal regulatory scheme, state laws are preempted if they appear to "disturb and disarrange" that scheme. (Warren Trading Post v. Tax Comm'n (1965) 380 U.S. 685, 690-691; accord New Mexico v. Mescalero Apache Tribe, *supra,* U.S. at p. [103 S.Ct. at p. 2388].)

Examples of this focus abound. In Warren Trading Post v. Tax Comm'n., *supra,* 380 U.S. 685, the Supreme Court held that a state could not tax the gross income on sales made to reservation Indians at a retail trading post located on the reservation. (*Id.*, at pp. 691-692.) The court emphasized the presence of "comprehensive" and "all-inclusive" regulations and statutes showing that "Congress ha[d] taken the business of Indian trading on reservations so fully in hand that no room remain[ed] for state laws imposing additional burdens upon traders." (*Id.*, at p. 690.)

In Ramah Navajo School Bd. v. Bureau of Revenue (1982) 458 U.S. 832, the Supreme Court held that federal law preempts a state from taxing the gross receipts that a non-Indian construction company receives from a tribal school board for construction of an Indian school on a reservation. (*Id.*, at pp. 834, 846-847.) The court noted that "[f]ederal regulation of the construction and financing of

Indian educational institutions is both comprehensive and pervasive." (*Id.*, at p. 839.) Thus, "the comprehensive federal regulatory scheme and the express federal policy of encouraging tribal self-sufficiency in the area of education preclude the imposition of the state gross receipts tax in this case." (*Id.*, at pp. 846-847.)

In *White Mountain Apache Tribe, supra,* 448 U.S. 136, the Supreme Court held that federal law preempted the imposition of state motor carrier license and use fuel taxes on a non-Indian logging company for its activities on the reservation. The court observed that the federal regulatory scheme for harvesting and selling Indian timber was so pervasive that it precluded imposition of the state taxes. (*Id.*, at p. 148.) The court also emphasized that the state taxes would obstruct federal policies. (*Ibid.*) In particular, the state taxes would undermine the "general federal policy of encouraging tribes 'to revitalize their self-government' and to assume control over their 'business and economic affairs.' [Citation.]" (*Id.*, at p. 149.)[8]

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[8]Appellants rely heavily *on Central Machinery Co. v. Arizona Tax Comm'n.* (1980) 448 U.S. 160. The issue in that case was whether a state could tax an on-reservation sale of farm machinery to an Indian tribe where the sale was made by an off-reservation corporation. (*Id.*, at p. 161.) Although the seller did not maintain a permanent place of business on the reservation, the court concluded that federal law governed the transaction in a comprehensive manner and, therefore, preempted the asserted state tax. (*Id.*, at pp. 165-166.)

Although *Central Machinery* is of no particular assistance in deciding the preemption issue in the present case, it does adhere to the line of Indian preemption cases which emphasize the comprehensiveness of the federal regulatory scheme.

The foregoing principles were recently applied in New Mexico v. Mescalero Apache Tribe, *supra,* U.S. [103 S.Ct. 2378] (hereafter *Mescalero*). Since *Mescalero* is one of the Supreme Court's latest pronouncements in the area, a detailed analysis of that case is useful to the resolution of the preemption issue.

With extensive federal assistance and supervision, the Mescalero Apache Tribe established a comprehensive scheme for the management of the reservation's fish and wildlife resources on its New Mexico reservation. (*Mescalero, supra,* U.S. at p. [103 S.Ct. at p. 2381].) State authorities sought to prohibit nonmembers of the reservation from possessing game killed in accordance with tribal regulations, but in violation of state regulations.[9] (*Id.*, at p. 2383.)

The *Mescalero* court reviewed the principles governing the Indian preemption cases and observed that "State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority." (U.S. at p. [103 S.Ct. at p. 2386].) The court then went on to note that in assessing federal and tribal interests, several principles guide the courts. Both the Indian tribes and the federal government "are firmly committed to the goal of promoting tribal self-government." (*Id.*, at p. 2386.) That goal is embodied in numerous federal

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[9]Numerous conflicts existed between state and tribal hunting regulations. For example, the tribe permitted a hunter to kill both a buck and a doe, whereas the state allowed only bucks to be killed. (*Mescalero, supra,* ... U.S. at p. .. [103 S.Ct. at p. 2383].)

statutes[10] and "encompasses far more than encouraging tribal management of disputes between members, but includes Congress' overriding goal of encouraging 'tribal self-sufficiency and economic development.'" (*Id.*, at pp. 2386-2387.) As a necessary implication of this broad commitment, an Indian tribe has "the power to manage the use of its territory and resources by both members and nonmembers. [Citations.]" (*Id.*, at p. 2387.)

The court then discussed guidelines to be used in assessing the state's interest. "The exercise of State authority which imposes additional burdens on a tribal enterprise must ordinarily be justified by functions or services performed by the State in connection with the on-reservation activity. . . . A State's regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate State intervention." (*Mescalero, supra,* U.S. at p. [103 S.Ct. at p. 2387].)

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[10]The court identified several such federal statutes. "For example, the Indian Financing Act of 1974, 25 U.S.C. § 1451 *et seq.* states: 'It is hereby declared to be the policy of Congress . . . to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities.' § 1451. Similar policies underlie the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 *et seq.*, as well as the Indian Reorganization Act of 1934, 25 U.S.C. § 461 *et seq.* . . . . The 'intent and purpose of the Reorganization Act was "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism."' [Citation.] The Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 *et seq.*, likewise reflects Congress' intent 'to promote the well-established federal "policy of furthering Indian self-government."' [Citation.]" (*Mescalero, supra,* . . U.S. at pp. . . .-. . ., fn. 17 [103 S.Ct. at pp. 2386-2387].)

It was upon this basis that the court held New Mexico could not superimpose its own hunting and fishing regulations on the tribe's regulatory scheme. (*Mescalero, supra,* U.S. at p. [103 S.Ct. at p. 2391].) The court emphasized that "concurrent jurisdiction would effectively nullify the Tribe's authority to control hunting and fishing on the reservation" by members and non-members. (*Id.*, at pp. 2388, 2391.) In effect, the exercise of state jurisdiction would wholly supplant the tribal regulations. (*Id.*, at p. 2388.) Furthermore, permitting state regulation "would completely 'disturb and disarrange' . . . the comprehensive scheme of federal and tribal management established pursuant to federal law." (*Ibid.*) Finally, the exercise of concurrent jurisdiction would "threaten Congress' firm commitment to the encouragement of tribal self-sufficiency and economic development." (*Id.*, at p. 2391.)[11]

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[11]Two weeks after *Mescalero* was decided, the Supreme Court decided another Indian preemption case, Rice v. Rehner (1983) ... U.S. ... [103 S.Ct. 3291]. In *Rice*, the court held that a state may require a federally licensed Indian trader who operates a general store on an Indian reservation to obtain a license to sell liquor for off-premises consumption. (*Id.*, at pp. 3293, 3298-3303.) In concluding that state regulation was not preempted by federal law, the court emphasized that Congress had authorized state regulation of Indian liquor transactions (18 U.S.C. § 1161). (*Rice, supra,* at pp. 3298-3303.) The court further observed that "[i]n the area of liquor regulation, [there are] no 'congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development.' [Citation.]" (*Id.*, at p. 3298.) The court also indicated that the interest in tribal sovereignty was minimal since Indians did not have a tradition of tribal self-government in the area of liquor regulation. (*Ibid.*)

Rice is inapposite. In the present case, there is no federal statute authorizing states to regulate Indian fishing on reservations. On the contrary, there is federal law—Public Law 280 (see *post*, at p. ..*)—which evidences Congress' intent to preempt state regula-

Applying the foregoing principles, this court must first determine how comprehensive the federal regulatory scheme is which governs Indian fishing on the Hoopa Valley Reservation. (25 C.F.R. pt. 250.)[12] The express purpose of the regulations is "to protect the fishery resources and to establish procedures for the exercise of the fishing rights of Indians of the Reservation until a Reservation-wide management mechanism is established with the capability to manage and regulate the Indian fisheries on the Reservation. The regulations are intended to promote reasonably equal access to the fishery resources of the Reservation by all Indians of the Reservation, and to assure adequate spawning escapement." (25 C.F.R. § 250.1(a).)

The regulations permit fishing for subsistence and ceremonial purposes only. (25 C.F.R. § 250.8(d).) They specify the types and sizes of nets that may be used and the locations where their use is permitted. (25 C.F.R. § 250.8(b),

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tion of fishing on reservations. (*Mescalero, supra,* 103 S.Ct. at pp. 2389-2390, fn. 25.) Moreover, Public Law 280 "evidences Congress' understanding that tribal regulation of hunting and fishing should generally be insulated from State interference, since 'Congress would not have jealously protected' tribal exemption from conflicting State hunting and fishing laws 'had it though that the States had residual power to impose such [laws] in any event.' [Citation.]" (*Mescalero, supra,* 103 S.Ct. at pp. 2389-2390, fn. 25.) It is evident from this statement that Indians have a tradition of self-government in the area of on-reservation fishing.

*Typed opn. at pp. 30-31.

[12]All further citations to the regulations are to those currently in effect unless otherwise noted. An earlier version of the regulations was operative at the time appellants committed the offense. (See 44 Fed. Reg. 17144-17151 (Mar. 20, 1979).) The regulations presently in effect are substantially similar to those which were operative at that time. Where necessary, relevant differences between the two versions are noted.

(c), (g)-(n), (p), (r), (s) & (t).) In particular, fishing with gill nets is allowed only on certain days, and during specified hours. (48 Fed.Reg. 41762-41763 (Sept. 19, 1983) § 250.8(b), (c).)

The regulations require particular markings to be made on fish caught on the reservation (25 C.F.R. § 250.9(a)), and limit the quantity of fish Indians may transport off the reservation without a special permit. (25 C.F.R. § 250.9-(b).)[13] In addition, the regulations authorize the Area Director of the Bureau of Indian Affairs to promulgate in-season and emergency regulations when necessary to ensure the proper management of the reservation fisheries, to meet conservation needs, and to protect "spawning escapement." (48 Fed.Reg. 41763 (Sept. 19, 1983).)

Commercial fishing, defined as "the taking of fish or fish parts with the prior or subsequent intent to sell or trade them or profit economically from them," is prohibited.[14] (25 C.F.R. § 250.8(e); 48 Fed.Reg. 41762 (Sept. 19, 1983).) Moreover, "[f]ish caught on the Hoopa Valley Indian Reservation may not be sold." (25 C.F.R. § 250.8(f).)

All "eligible Indians" of the Hoopa Valley Indian Reservation are governed by the regulations and are required to obtain and possess a fisher's identification card[15] before exercising any fishing rights on the reservation. (25 C.F.R. §§ 250.1(c), 250.5, 250.6.)

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[13]This limit was not in effect at the time appellants committed their offense.

[14]It was also prohibited at the time of appellants' offense. (44 Fed.Reg. 17149 (Mar. 20, 1979).)

[15]Appellant McCovey possessed such a card when he engaged in the acts leading to the present prosecution.

The regulations also provide that federal and tribal officials and any other person deputized to enforce the regulations have authority to make arrests, seize fishing gear, and issue citations with respect to violations of the regulations. (25 C.F.R. §§ 250.4, 250.14.) Indians who violate the regulations are subject to prosecution before the Court of Indian Offenses of the Hoopa Valley Indian Reservation. (25 C.F.R. §§ 250.14, 250.15; see also 25 C.F.R. pt. 11.) For example, an eligible Indian who violates the regulations by fishing for commercial purposes may be fined up to $500, sentenced to jail for up to 6 months or have his or her fishing rights suspended for up to 180 days. (25 C.F.R. § 250.15(e).)

Finally, it is noteworthy that these regulations governed appellant McCovey's conduct. Jurisdiction of the Indian court specifically extends to off-reservation sales of fish caught on the reservation. (25 C.F.R. § 250.1(c).[16]) As the commentary to the regulations explains, "[o]ne commentator [had] expressed concern that the statement in [25 C.F.R.] § 250.1(c) that violations of the regulations occurring either on or off the reservation are punishable in the court of Indian offenses could be construed as an assertion that the regulations govern Indian fishing off the reservation. Although the regulations govern only fish taken by Indians on the reservation, *they prohibit Indians from selling the fish either on or off the reservation.* The statement in § 250.1(c) has been modified to make it clear that the regulations regulate off-reservation Indian activity only

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[16]This provision states in pertinent part: "Violations of these regulations that relate to fishing on the reservation are punishable in the court of Indian offenses regardless of whether the offense was committed on or off the reservation."

when it involves fish caught on the reservation." (47 Fed. Reg. 32844 (July 29, 1982), emphasis added.)

There is little question that the exercise of state criminal jurisdiction in this area will "disturb and disarrange" the federal scheme. (Warren Trading Post v. Tax Comm'n., *supra*, 380 U.S. at p. 691.) Concurrent jurisdiction by the state would supplant the present federal regulatory scheme with an inconsistent dual system.

The federal regulations permit gill nets to be used to a limited extent, while California completely prohibits their use in the taking of salmon, steelhead or striped bass. (Compare 25 C.F.R. § 250.8(b), (c), (h) & (t) with §§ 8685.5, 8685.6.) The penalties for appellants' conduct in this case are more severe under California law. The maximum fine for a violation of section 8685.6 is $10,000, while the maximum fine under the federal regulations is $500. (Cf. § 12004 with 25 C.F.R. § 250.15(e).) Violations of the federal regulations are adjudicated in reservation courts before Indian judges and juries, while violations under the Fish and Game Code are adjudicated in non-Indian courts.

Moreover, state jurisdiction over Indian offenses involving fish caught on the reservation would "effectively nullify" the express purpose of the federal regulations. (*Mescalero, supra,* ..... U.S. at p. ..... [103 S.Ct. at p. 2388].) With the state asserting its authority in the area, there would be no incentive for the Hoopa Valley Reservation Indians ever to establish a reservation-wide system capable of managing and regulating the resources of the reservation. If the tribe did establish a system, its authority to regulate would have but a "hollow ring" and the exercise of that authority would be "only at the sufferance of the State." (*Ibid.*) Thus,

state jurisdiction would thwart Congress' overriding commitment to the encouragement of tribal self-government and economic development.

The remaining inquiry is whether the state interests here are sufficient to justify the exercise of state jurisdiction. (*Mescalero, supra,* U.S. at p. [103 S.Ct. at p. 2386].) In this case, the state asserts an interest in conservation.[17]

The state's argument must be considered against the backdrop of United States Supreme Court precedent. No Supreme Court decision in the Indian preemption area has held that a state's interest in conservation justifies a finding of concurrent jurisdiction.[18] In a nonpreemption context, the court has held that a state may, in the interest of conser-

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[17]The state has prohibited commercial fishing in the Klamath river since 1933. (§ 8434, formerly § 484.5.) It prohibits troll fishing in ocean waters "within three nautical miles north and south of a line drawn due west for three nautical miles from the center" of the mouths of the Klamath and Smith rivers, and during August and September within a similar but smaller area outside the mouth of the Eel River. (Cal. Admin. Code, tit. 14, § 27.75.) It also limits to two the number of salmon that can be taken by those engaged in sport fishing on the river. (*Id.*, § 27.80.)

[18]*Mescalero* indicates that off-reservation effects of on-reservation activity *may* warrant state intervention where the state points to a need to conserve a "scarce, common supply" of its resources. (... U.S. at p. ... [103 S.Ct. at p. 2390].) In that case, however, the state could point to no such effects, and conceded "that the Tribe's management ha[d] not had an adverse impact on fish and wildlife outside the reservation." (*Id.* at pp. ... [103 S.Ct. at pp. 2390-2391].)

Moreover, the court specifically rejected the state's claim that deficiencies in enforcement powers compelled the exercise of concurrent jurisdiction, since the tribe could itself exercise such powers as well as rely on federal statutory prohibitions. (*Id.*, at p. . . , fn. 27 [103 S.Ct. at p. 2391].)

vation, regulate Indian fishing rights which were created by treaty. (Puyallup Tribe v. Dept. of Game (1968) 391 U.S. 392, 398-399 (hereinafter *Puyallup I);* Puyallup Tribe v. Washington Game Dept. (1977) 433 U.S. 165, 173-177 (hereafter *Puyallup III*); Washington Game Dept. v. Puyallup Tribe (1973) 414 U.S. 44 (hereafter *Puyallup II*).) However, in those cases, the treaty simply guaranteed the Indians the right to fish in common with other citizens of the state. (*Puyallup I, supra,* 391 U.S. at p. 398.) No comprehensive federal regulatory scheme was in place.

Even assuming that this distinction is insufficient, state regulation on the basis of conservation is permitted only when (1) it is reasonable and necessary, and (2) it does not discriminate against the Indians. (See Washington v. Fishing Vessel Assn. (1979) 443 U.S. 658, 682-685; *Puyallup III, supra,* 433 U.S. at pp. 173-177; *Puyallup II, supra,* 414 U.S. 44, 48-49; *Puyallup I, supra,* 391 U.S. at pp. 398-399, 401, fn. 14.)

The state's interest in conservation of salmon is adequately protected by the federal regulations. An elaborate federal scheme regulates both on-reservation fishing and off-reservation sales. This factor—entirely absent in the *Puyallup* cases—is itself sufficient to preclude state intervention.[19] Moreover, the existence of accompanying mechanisms for enforcement should adequately dispel the con-

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[19]The *Puyallup II* court based its holding that state intervention was proper in part upon the premise that the police power of the state was necessary to preserve steelhead trout, an important state resource. (414 U.S. at p. 49.) Here, the federal "police power"—which presently prohibits all commercial fishing on the reservation and any off-reservation sales of fish caught on the reservation—serves that purpose.

cern that exclusive federal jurisdiction will impact adversely on state resources. (See *Mescalero, supra,* ..... U.S. at pp. .....-....., fn. 27 [103 S.Ct. at pp. 2390-2391]; 25 C.F.R. § 250.1(c); 47 Fed. Reg. 32844 (July 29, 1982).)

The state's exercise of concurrent jurisdiction over off-reservation sales of reservation-caught fish by Indians of the Hoopa Valley Reservation clearly interferes and is incompatible with the federal and tribal interests reflected in the comprehensive federal regulatory scheme. Moreover, the state has not shown that its interest in conservation is sufficient to justify assertion of concurrent authority. Thus, the state is preempted from exercising jurisdiction over appellant McCovey.[20]

IV.

Several subsidiary issues relating to preemption remain.

The state argues that the regulations cannot be held to preempt California law because they were promulgated in excess of the Secretary of the Interior's authority.[21] In support of that position, the state relies on Kake Village v. Egan (1962) 369 U.S. 60 (hereafter *Kake Village).*

In *Kake Village,* Alaska sought to enforce its antifish-trap conservation statute against nonreservation Indians.

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[20]Since appellant McCovey's preemption claim is meritorius, this court need not address any of his other contentions. (See *ante,* at p. ....*)

*Typed opn. at pp. 4-5.

[21]The regulations at issue were promulgated by the Department pursuant to various statutes. (See 25 C.F.R. pt. 250, Authority; 43 U.S.C. § 1457; 25 U.C.C. §§ 2, 9, 13; Reorganization Plan No. 3 of 1950 (65 Stat. 1262).) Under these statutes, the Department is responsible for the supervision and management of Indian affairs. The Department has noted that its authority extends to "the protection and implementation of federally reserved Indian fishing rights. (44 Fed.Reg. 17144 (Mar. 20, 1979).)

(369 U.S. at p. 62.) The Secretary of the Interior (hereafter Secretary) had issued regulations—purportedly under authority of the White Act (48 U.S.C. §§ 221-228), and the Alaska Statehood Act (72 Stat. 339)—permitting the Indians to use fish traps, thus granting them fishing rights not previously held. (*Id.*, at pp. 61-63.)

In holding that the Secretary lacked such authority, the court emphasized that these statutes gave the Secretary the power only to regulate the exercise of existing rights, not to grant new ones. (*Id.*, at pp. 62-63.) In addition, the court observed that none of the Indians affected belonged to any reservation. (*Id.*, at p. 62.) The court also noted that the power conferred upon the President under 25 United States Code sections 2 and 9 did not give the Department "a general power to make rules governing Indian conduct." (*Id.*, at p. 63.)

This case, in contrast to *Kake Village*, involves reservation Indians who fished on their reservation. More importantly, the regulations here did not *grant* Hoopa Valley Reservation Indians fishing rights as such. Instead, these rights were granted by Congress when it authorized the President to create the reservation for Indian purposes.[22] (Arnett v. Five Gill Nets, *supra*, 48 Cal.App.3d at p. 459, cert. den., 425 U.S. 907.) Thus, even though some of the same statutes at issue in *Kake Village* provided the basis

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[22]It is well established that the creation of a reservation for Indian purposes encompasses the right to fish on the reservation. (Menominee Tribe v. United States (1968) 391 U.S. 404, 405-406; Quechan Tribe of Indians v. Rowe (1972) 350 F.Supp. 106, 111; Donahue v. Justice Court (1971) 15 Cal.App.3d 557, 562; see also Kimball v. Callahan (9th Cir. 1974) 493 F.2d 564, 566, cert. den., 423 U.S. 1086; Pacific Coast Fed. v. Secretary of Commerce (1980) 494 F.Supp. 626, 632.)

for the present regulations, the fact that fishing rights had previously been granted by other authority renders that case inapposite.

The state also contends that whatever federally created commercial fishing rights appellants possess for on-reservation activity, such rights do not include the right to sell fish off the reservation. The state argues that Mescalero Apache Tribe v. Jones (1973) 411 U.S. 145 and Ward v. Race Horse (1896) 163 U.S. 504 support its position. Neither decision is on point.

In Ward, the United States Supreme Court held that the State of Wyoming had the power to regulate off-reservation killing of game by Indians. (163 U.S. at pp. 514-516.) In Jones, the tribe operated a ski resort off the reservation. The State of New Mexico imposed a tax on the gross receipts of the resort. (411 U.S. at p. 146.) In upholding the state's right to tax, the court stated, "*[a]bsent express federal law to the contrary,* Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." (*Id.,* at pp. 148-149, emphasis added.)

Both *Jones* and *Ward* are distinguishable in at least two respects. First, the Indian activity in those cases occurred entirely off the reservation, while this case involves on-reservation fishing followed by an off-reservation sale. Second, "express federal law to the contrary" is present here. The federal regulations expressly govern off-reservation sales of reservation-caught fish and impose sanctions at odds with state law.

In a separate argument, the state asserts that Public Law 280 (67 Stat. 588 & 589, 18 U.S.C. § 1162, 28 U.S.C.

§ 1360) authorizes California to prohibit Indian commercial fishing on the reservation.

In 1953, Congress enacted Public Law 280, which authorized California and other named states to assume civil and criminal jurisdiction over Indians. (28 U.S.C. § 1360; 18 U.S.C. § 1162; see Arnett v. Five Gill Nets, *supra*, 48 Cal. App.3d at p. 459.) The statute granting states criminal jurisdiction over Indian offenses provides, however, that states are not authorized to "deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof." (18 U.S.C. § 1162(b).)

The state takes the position that the above-quoted language does not apply in this case, because the fishing rights here were not based on a treaty, statute or agreement, but on an executive order. This argument was specifically rejected by the Court of Appeal in Arnett v. Five Gill Nets, *supra*, 48 Cal.App.3d at pages 459-462, certiorari denied, 425 U.S. 907. As the *Arnett* court held, the executive order in that case was itself promulgated pursuant to statutory authority, thus coming within the specific proscription of the 1953 provision. This holding is sound.

V.

The conclusion that the state is preempted from prosecuting appellant McCovey for violating section 8685.6 is not dispositive of appellant Wilkie's claims. As the federal regulations make clear, "[a]ny person who is not an Indian of the [Hoopa Valley] Reservation . . . is not regulated

under this part . . . ." (25 C.F.R. § 250.3(b).)[23] As the commentary accompanying the most recent revision to the regulations indicates, "[b]e cause the federal regulations do not apply to [persons without Indian fishing rights], the [Bureau of Indian Affairs] relies on state enforcement to prevent illegal depletion of the resource by such individuals. It is clearly in the interest of the Indians to facilitate state enforcement of its restrictions on non-Indian fishers in order to maximize the number of fish for spawning and Indian harvest." (48 Fed.Reg. 41761 (Sept. 19, 1983).)

Since no federal regulations preempt the exercise of state jurisdiction as to appellant Wilkie's activities, the state properly exercised jurisdiction in his case. (See Washington v. Confederated Tribes (1980) 447 U.S. 134, 161 ["For most practical purposes those Indians (not members of the reservation) stand on the same footing as non-Indians . . . ."].)[24]

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[23]The regulations in effect at the time of the sale in this case contained a provision substantially identical to section 250.3(b) of 25 Code of Federal Regulations. (See 44 Fed.Reg. 17148 (Mar. 20, 1979) § 258.3(b).)

[24]Appellants also argue that section 8685.6 as applied to reservation Indians for sales of reservation-caught fish discriminates against and/or burdens Indian commerce.

As to Wilkie, this argument is inapplicable, since he is not an Indian of the Hoopa Valley Reservation. Furthermore, the item of commerce involved here is a Hoopa Valley Reservation resource. Wilkie should not be able to claim discrimination against Indian commerce based on the sole fact that he is an Indian. (See, e.g., Washington v. Confederated Tribes, *supra*, 447 U.S. at pp. 160-161.) Lastly, the federal regulations—as a statement of tribal policy until a reservation-wide system can be organized—prohibit sale of salmon, a reservation resource, by reservation Indians. A rule that

VI.

Accordingly, this court holds that federal law preempts the state from regulating the off-reservation sale or possession for sale of fish caught by Hoopa Valley Reservation Indians on the reservation. In light of this holding, McCovey's judgment of conviction is reversed, and Wilkie's judgment of conviction is affirmed.

Bird, C.J.

We concur:

Mosk, J.
Kaus, J.
Broussard, J.
Reynoso, J.
Grodin, J.
Lucas, J.

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would permit Wilkie to sell salmon but prohibit reservation Indians from doing so would produce an anomalous result.

Appellants' argument that state prosecution of reservation Indians for the off-reservation sale of reservation-caught fish infringes upon the Indians' federally protected right to fish on the Hoopa Valley Reservation is also inapplicable as to Wilkie since he is not an Indian of the Hoopa Valley Reservation.

Appendix 2

In the Court of Appeal of the State of California
First Appellate District, Division Three
Certified for Publication

A012716

1 Crim. No. 23742

(Super. Ct. No. 77139)

The People of the State of California,
Plaintiff and Respondent,

v.

Walter McCovey, Jr. and
Lance R. Wilkie,
Defendants and Appellants.

[Filed July 21, 1983]

Defendants Walter McCovey and Lance Wilkie were convicted of violating Fish and Game Code section 8685.6, which prohibits selling or possessing for sale salmon, steelhead, or striped bass taken in California waters by use of a gill net.[1] The principal question in their appeal is whether the state has jurisdiction to regulate the off-reservation sale or possession for sale of fish caught on the Klamath River by Hoopa Valley Reservation Indians.

[1]Section 8685.6 was enacted as urgency legislation, effective July 11, 1980. (Stats. 1980, ch. 393, § 2, p. 775.) The maximum punishment for a violation of the section is a fine of $5,000, or imprisonment in either state prison or county jail for not more than a year, or both fine and imprisonment. (Fish and G. Code, § 12004.)

I

Defendant McCovey is a Yurok Indian of the Hoopa Valley Indian Reservation in northern California. In September 1980, McCovey offered to sell approximately 1,400 pounds of salmon to a fish wholesaler in San Jose, for $2.15 per pound. McCovey had caught the salmon, each weighing from 10 to 12 pounds, with gill nets on the Klamath River, somewhere between its mouth and its confluence with the Trinity River, within the boundaries of the Hoopa Valley Reservation. After McCovey and defendant Wilkie, who is not a Yurok Indian, delivered the fish to the wholesaler, they were arrested by officers of the state's Department of Fish and Game.

In addition to being charged with violating section 8685.6 (count one), the two were charged with conspiracy to violate section 2002 of the Fish and Game Code, which prohibits possession of any fish taken in violation of any of the provisions of that code (count two), and with violating section 2002 itself (count three).[2] Defendants demurred (Pen. Code, § 1004) and moved to dismiss the information (Pen. Code, § 995), primarily on the ground that as a Yurok Indian, defendant McCovey had a federally protected right to fish on the Klamath River, and that the state had no jurisdiction to restrict that right by prohibiting him from selling fish which he lawfully caught. The trial court granted the motion to dismiss with respect to counts two and three, but denied it with respect to count one, reasoning that although reservation Indians may have the right to gill

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[2]The information does not specify which provision of the Fish and Game Code defendants allegedly violated and conspired to violate, but Fish and Game Code section 8685.5 provides that gill nets may not be used to take salmon, steelhead, or bass.

net fish on the reservation, the state can control the off-reservation sale of such fish. Defendants then submitted the matter on the preliminary hearing transcript, and were found guilty. McCovey was fined $2,500 and placed on probation, on condition he serve 90 days in jail; the sentence was stayed pending appeal. Wilkie was fined $500 and placed on probation.

II

Defendant McCovey contends: (1) his prosecution was an unlawful interference with his federally protected right to fish on the lower Klamath River, absent proof that the state had exhausted all other means of conserving the salmon fishery on that river; (2) the state's power to regulate his fishing rights had been preempted by regulations promulgated by the Department of the Interior; and (3) Fish and Game Code section 8685.6 impermissibly discriminates against Indians and Indian commerce. Without citation to authority, defendant Wilkie argues only that if the state had no jurisdiction to prosecute McCovey, Wilkie's conviction should also be reversed.

Some background information is essential to an understanding of this controversy and of the defendants' contentions. In 1953, Congress passed Public Law No. 280 (67 Stat. 588, 18 U.S.C. § 1162; 28 U.S.C. § 1360), granting California, among other states, jurisdiction over offenses committed by Indians in the areas of "Indian country." Public Law No. 280 also provided, however, that "[n]othing in this section . . . shall deprive any Indian or any Indian tribe . . . of any right, privilege, or immunity afforded under

Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof." (18 U.S.C. § 1162(b).)

"Indian country" includes all lands within the limits of any Indian reservation. (18 U.S.C. § 1151.) The boundaries of the Hoopa Valley Indian Reservation were settled by the United States Supreme Court in *Mattz v. Arnett* (1973) 412 U.S. 481. In *Mattz,* a California game warden seized gill nets owned by a Yurok (or Klamath River) Indian, which were stored close to the Klamath River, within 20 miles of its mouth. Use of the nets was prohibited by the state's Fish and Game Code. The Supreme Court held that the nets were seized within the Hoopa Valley Reservation, which it defined as a strip of territory commencing at the Pacific Ocean and extending one mile in width on each side of the Klamath River for approximately 50 miles, where it connects with a 12-mile square area known as the Original Hoopa Valley Reservation. The court then remanded the matter for a determination of the existence of the Indian's fishing rights and the applicability of California law notwithstanding reservation status. (*Mattz, supra,* 412 U.S. at p. 485.)

On remand, this court held that Indians on the reservation had fishing rights which were granted by implication with the creation of the reservation "for Indian purposes," and that state qualification of those rights was precluded both by the supremacy clause of the United States Constitution and by the renewed guarantee of Indian fishing rights in Public Law No. 280. (*Arnett v. Five Gill Nets* (1975) 48 Cal.App.3d 454, 461-462; see *Blake v. Arnett* (9th Cir. 1981) 663 F.2d 906, 909, 911.)

Commercial fishing was not an issue in *Five Gill Nets,* as the Indian whose nets were seized fished only "for the subsistence of his family." (*Five Gill Nets, supra,* at p. 458.) No appellate court has as yet precisely defined the outer limits of the rights recognized in that case, although more than one court has considered the character of a right to fish guaranteed by treaty language (see, e.g., *Puyallup Tribe v. Dept. of Game* (1967) 391 U.S. 392, 395 (*Puyallup I*); *Washington v. Fishing Vessel Assn.* (1979) 443 U.S. 658; see also *New Mexico v. Mescalero Apache Tribe* (June 13, 1983) ..... U.S. ....., ... [51 U.S.L.Week 4741, at p. 4744] [Tribe's original reliance on wildlife for subsistence and fact that tribal members "freely" took fish and game in ancestral territory led Supreme Court to conclude that the sovereignty retained by tribe under treaty included its right to "regulate the use of its resources" by members and nonmembers].)

Regardless of the original extent of those rights, however, commercial fishing for salmon on the lower Klamath by Hoopa Valley Reservation Indians was prohibited by federal regulation at the time of defendants' arrest. (44 Fed.Reg. 17144-17151 (Mar. 20, 1979) [former 25 C.F.R. § 258.1 et seq.].) Commencing in 1977, the Department of the Interior promulgated extensive regulations governing

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[8]Congress has the power to cancel unilaterally rights guaranteed by Indian treaty (*Lone Wolf v. Hitchcock* (1903) 187 U.S. 553, 566), and Congress or the President can terminate rights conveyed by creation of an Indian reservation pursuant to executive order. (*Hynes v. Grimes Packing Co.* (1949) 337 U.S. 86, 103.) Regulations promulgated by the Secretary of the Interior, pursuant to congressional or presidential authorization, have the force of statutory

Indian fishing within the boundaries of the Hoopa Valley Reservation,[3] "to protect the fishery resources and to establish procedures for the exercise of the fishing rights of Indians of the Reservation until a Reservation-wide management mechanism is established with the capacity to manage and regulate the Indian fisheries on the Reservation." (44 Fed.Reg. 17144, 17148 [former 25 C.F.R. § 258.1(a)].) Among other provisions, the regulations defined "eligible Indian fishers," required them to obtain an Indian fishers' identification card before exercising any Indian fishing rights, and specified permissible and prohibited fishing gear. (*Id.*, at p. 17149 [former §§ 258.6, 258.8].) While the regulations in effect at the time of defendants' arrest permitted some use of gill nets, they flatly prohibited commercial fishing and the sale of salmon caught on the Hoopa Valley Reservation. Commercial fishing was defined as the taking of salmon or steelhead with the intent to sell them or profit commercially from them; consumptive or subsistence fishing was defined as the taking of salmon or steelhead for personal consumption by Indians of the reservation and their immediate families. (*Id.*, at pp. 17148-17149 [former §§ 258.4(b), (c), 258.8(c), (d)].) Indians violating the regulations were subject to prosecution before the Court of Indian Offenses of the Hoopa Valley Reservation; a first violation of the commercial fishing prohibition was punish-

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enactments. (*Bridgeman v. United States* (9th Cir. 1905) 140 Fed. 577, 583; *United States v. Thurston County, Neb.* (8th Cir. 1906) 143 Fed. 287, 291.) These regulations were promulgated to the Secretary's statutory responsibility for the supervision and management of Indian affairs. (43 U.S.C. § 1457, 25 U.S.C. §§ 2, 9; see 44 Fed.Reg. 17144.)

able by a fine of no more than $200, or two months in jail, or thirty days suspension of tribal fishing rights. (*Id*, at pp. 17150-17151 [former §§ 258.14, 258.15].)

In short, McCovey's sale of Klamath River salmon was prohibited by these federal regulations, as well as by state law.

III

We turn to a consideration of defendants' contentions. First, defendants argue that their prosecution was an unlawful interference with McCovey's federally protected right to fish on the lower Klamath River.

The narrow issue in this case is the state's jurisdiction to regulate the off-reservation sale of salmon caught on the Klamath River by reservation Indians. With certain exceptions, the general rule is that outside "Indian country," Indians are subject to nondiscriminatory state laws, absent express federal law to the contrary. (*New Mexico v. Mescalero Apache Tribe, supra,* .... U.S. .... [51 U.S.L. Week at p. 4744, fn. 18; see *DeCoteau v. District County Court* (1975) 420 U.S. 425, 429, fn. 3; see also Cohen, Handbook of Federal Indian Law (1982 ed.) p. 348.)

In tacit recognition of that general rule, defendants argue that although the state purports to be regulating only off-reservation conduct, the effect of its prohibition on the sale of gill-netted salmon is to interfere with the on-reservation fishing rights which were recognized in *Arnett v. Five Gill Nets, supra,* 48 Cal.App.3d 454. Those rights, defendants argue, included the right to determine what use to make of the fish, and thus cannot be abridged by making a

distinction between subsistence and commercial fishing. Defendants acknowledge that under certain circumstances and despite Public Law No. 280, state regulation of federally protected fishing rights has been upheld, provided that the regulation is a reasonable and necessary conservation measure, that its application to Indians is necessary in the interests of conservation, and that it does not discriminate against Indians. (See generally, *Washington v. Fishing Vessel Assn.* (1979) 443 U.S. 658; *Puyallup Tribe v. Washington Game Dept.* (1977) 433 U.S. 165 (*Puyallup III*); *Antoine v. Washington* (1975) 420 U.S. 194; *Washington Game Dept. v. Puyallup Tribe* (1973) 414 U.S. 44 (*Puyallup II*); see also *New Mexico v. Mescalero Apache Tribe, supra,* U.S. at pp. [51 U.S.L.Week at pp. 4743, fn. 15, 4746].) Defendants argue that in this case, the state has failed to prove that enforcement of the statutes at issue is necessary for conservation purposes.

The parties argue at length about the scope of the fishing rights recognized in Five Gill Nets, but we need not and do not resolve that dispute. As we have already explained, at all times relevant to this case, federal regulations banned Indian commercial fishing on the reservation. Accordingly, the state's prosecution of defendants simply did not interfere with any federally protected fishing rights, and we are aware of no federal law which would immunize reservation Indians from prosecution for conduct off the reservation which violates the state's fish and game laws.

We recognize that the federal ban on Indian commercial fishing may not necessarily be permanent. The Department of the Interior has indicated its belief that although a mora-

torium on commercial fishing is presently required, the right to fish commercially on the reservation does exist, and "may be exercised at such time in the future when the fish runs can withstand the increased harvest." (44 Fed.Reg. 17146 (Mar. 20, 1979).) Moreover, at some future date the federal regulations may be replaced by federally approved tribal ordinances. We will not speculate about or attempt to resolve a conflict which did not exist at the time of defendants' arrest, which is presently nonexistent,[4] and which may or may not ever materialize. A court will not consider every conceivable situation which might arise under the language of a statute, and will not consider the question of constitutionality with reference to hypothetical situations. (*People v. Parker* (1973) 33 Cal.App.3d 842, 848; *Max Factor & Co. v. Kunsman* (1936) 5 Cal.2d 446, 468.)

The Attorney General urges that we not confine our decision to the state's power to regulate off-reservation conduct. He begins his assault on Indian fishing rights by arguing that the state has jurisdiction to regulate commercial fishing on the Klamath by reservation Indians; therefore, he reasons the federal government is without authority to regulate such fishing. First, notwithstanding *Mattz v. Arnett, supra,* 412 U.S. 481, and *Arnett v. Five Gill Nets, supra,* 48 Cal.App.3d 454, he argues that the Klamath River is not part of the Hoopa Valley Indian Reser-

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[4]Former 25 Code of Federal Regulations, section 258 et seq. has been redesignated as 25 Code of Federal Regulations, section 250 et seq. (47 Fed.Reg. 13227 (1982)); the regulations continue to prohibit commercial fishing and the sale of fish caught on the Hoopa Valley Indian Reservation. (25 C.F.R. § 250.8(c), (d).)

vation, and that therefore the state has sovereign regulatory control of the river's waters.[5] In the alternative, he argues that when Congress authorized creation of the reservation, it neither granted nor intended to grant commercial as opposed to subsistence fishing rights. Therefore, he reasons, the state has unfettered power to regulate commercial fishing. In a related argument, he speculates that the Department of the Interior may someday permit commercial fishing on the reservation, and argues that any regulation to that effect would be beyond the scope of the department's authority. Next, he argues that even if the Indians do have commercial fishing rights on the Klamath, those rights have been properly restricted by the state for conservation purposes.

We sympathize with the state's desire to clarify the limits of its authority over Klamath River fishing by Hoopa Valley Reservation Indians. However, we need not reach the issues raised by the Attorney General in order to affirm defendants' convictions. We will not gratuitously

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[5]Briefly stated, this argument is based on the premise that when California became a state in 1850, it acquired title to the beds of navigable waters within its boundaries, including the lower Klamath. Because California's statehood predated the creation of the reservation, the Attorney General argues, the federal government had no power to convey either the title to the riverbed or to grant the right to fish commercially therein when the reservation was established. In neither *Mattz v. Arnett, supra*, 412 U.S. 481 nor *Arnett v. Five Gill Nets, supra*, 48 Cal.App.3d 454 did the state raise the issue of its title to the bed of the Klamath, and the Attorney General has failed to enlighten us as to how this navigable waters theory is to be reconciled with *Arnett v. Five Gill Nets*. If the federal government was as impotent after 1850 as the Attorney General would have us believe, how then did it grant or reserve the rights recognized in *Five Gill Nets*?

express our views on matters which are unnecessary to our decision, particularly when those issues involve factual disputes which were never before the trial court. We hold only that the state's prosecution of defendant McCovey did not interfere with his federally protected fishing rights, because at the time of his arrest, he had no right to fish for commercial purposes on the Hoopa Valley Indian Reservation.

Defendants also contend that with the adoption of regulations governing Indian fishing on the Hoopa Valley Reservation, the federal government preempted the field of regulation of Indian fishing and related activities.

The standards of federal-state preemption which have emerged in other areas of the law are generally not helpful in analyzing federal enactments which regulate Indian tribes, because of the unique historical traditions of Indian sovereignty over the reservation and tribal members, and the federal commitment to tribal self-sufficiency and self-determination. (*New Mexico v. Mescalero Apache Tribe, supra,* U.S. at p. [51 U.S.L. Week at p. 4743]; *White Mountain Apache Tribe v. Bracker* (1980) 448 U.S. 136, 143.) With respect to the conduct of Indians and non-Indians on a reservation, the United States Supreme Court has rejected the proposition that in order to find a particular state law preempted by operation of federal law, an express congressional statement to that effect is required. (*Id.* at p. 144.) Indians going beyond reservation boundaries, however, have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the state, absent express federal law to the contrary. (*New*

Mexico v. Mescalero Apache Tribe, supra, ... U.S. ..... at p. ....., [51 U.S.L. Week at p. 4744, fn. 18]; *Mescalero Apache Tribe v. Jones* (1972) 411 U.S. 145, 148-149; *White Mountain Apache Tribe v. Bracker, supra,* 448 U.S. at p. 144, fn. 11.) That principle is relevant to a state's criminal laws, and applies to tribal fishing enterprises. (*Id.,* at p. 149, citing *Kake Village v. Egan* (1961) 369 U.S. 60.) In *Kake Village,* the Supreme Court upheld the power of the State of Alaska to enforce its anti-fish-trap regulations against two Indian communities which had not been provided with a reservation and which did not have any fishing rights derived from federal laws. (*Id.,* at pp. 62, 76; see also *In re Wilson* (1981) 30 Cal.3d 21.)

The federal regulations which we have already summarized do not provide that Indians who leave the reservation are immune from prosecution under state law, and defendants do not contend otherwise. Instead, defendants rely on the rule that the federal adoption of a general regulatory scheme to govern commerce with Indians or other reservation activity will preclude any efforts by nonfederal government entities to regulate the same activity. (See, e.g., *New Mexico v. Mescalero Apache Tribe, supra,* ..... U.S. ....., [51 U.S.L.Week 4741] [tribe's authority to regulate hunting and fishing on reservation preempts state jurisdiction to regulate hunting and fishing by nonmembers on the reservation, as concurrent jurisdiction would effectively nullify tribe's authority]; *White Mountain Apache Tribe v. Bracker, supra,* 448 U.S. 136 [pervasive federal regulatory scheme for harvesting Indian timber precludes imposition of state motor carrier license and use fuel taxes on non-

Indian logging company's activity on tribal land]; *Ramah Navajo Sch. Bd. v. Bureau of Revenue* (1982) ..... U.S. ..... [73 L.Ed.2d 1174] [comprehensive federal regulation of construction and financing of Indian education institutions precludes imposition of state gross receipts tax on non-Indian construction company which built school on reservation]; see also *Santa Rosa Band of Indians v. Kings County* (9th Cir. 1975) 532 F.2d 655, 668 [application of county building codes and zoning ordinances to reservation would interfere with federal statutory programs aimed at upgrading living conditions of reservation Indians.) However, the preemption analysis upon which defendants rely is not controlling when the question is the applicability of state law to Indians outside the reservation. (See, e.g., *Mescalero Apache Tribe v. Jones, supra,* 411 U.S. 145 [state has power to impose gross receipts tax on ski resort operated by Mescalero Apache Tribe outside the boundaries of reservation, but imposition of use tax prohibited by federal statute].) As we have already indicated, we find no federal law precluding the state from prosecuting defendant McCovey for selling or possessing for sale gill-netted fish outside the reservation.

Finally, defendants' contention that state law discriminates against reservation Indians because only they have the right to fish with gill nets on the Klamath is also without merit, as defendant McCovey had no right to gill-net *for commercial purposes* on that river. In light of our conclusion that the state did not act in excess of its jurisdiction in prosecuting defendant McCovey, we need not consider whether defendant Wilkie could claim that he had been

licensed or granted permission to sell Klamath River salmon by tribal authorities. (See *Donahue v. Justice Court* (1971) 15 Cal.App.3d 557.)

Judgments are affirmed.

CERTIFIED FOR PUBLICATION

Scott, J.

We concur:

White, P,J,

Barry-Deal, J.

Appendix 3

Order Due
August 24, 1984

ORDER DENYING REHEARING

Crim. No. 23387

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA
IN BANK

[Filed August 22, 1984]

PEOPLE

vs.

WALTER McCOVEY et al.

Petitions for rehearing DENIED.

Appendix 4

DEPARTMENT OF THE INTERIOR
Office of the Assistant Attorney-General
Washington

January 20, 1981

The Klamath River Indian Reservation

To the: Secretary of the Interior.

Sir:

I am in receipt of a letter from the Commissioner of Indian Affairs dated January 7, 1891, referred to me by you, and also of two communications from the Commissioner dated June 24, and October 24, 1889, respectively, which were heretofore referred to me by Acting Secretary Chandler. All these communications relate to the Klamath River Indian Reservation in California and the Indians thereon.

The Commissioner propounds two inquiries, which he wishes answered. The first is, in substance, whether the Department is authorized to cause the removal of intruders from said reservation; and the second is, in effect, whether the lands within the limits of said reservation can be allotted to the Indians living upon them, as reservation Indians, or under the legislation providing for allotments to non-reservation Indians. By your reference you ask that I advise you whether the Hoopa Valley reservation may not be legally extended so as to cover the ground of the Klamath reservation." An answer to these questions involves an

examination into the history, and an ascertainment of the present status of said reservation.

By the Indian appropriation act of March 3, 1855 (10 Stats., 699), there was appropriated "for collecting, removing and subsisting the Indians in California . . . on two additional military reservations," the sum of $150,000. By executive order of November 16, 1855, "a strip of territory, commencing at the Pacific Ocean, and extending one mile in width on each side of the Klamath river," to the extent of about twenty miles, but not to exceed an area of 25,000 acres, was set aside as one of the two reservations to be made under authority of the act last cited. The Indians for whose benefit this reservation was formally made were a peaceable and semi-civilized race, who had been occupying the lands in question, and subsisting themselves mainly upon the fish taken from the Klamath River, prior to and ever since the acquisition of California by the United States. The reservation thus established was placed in charge of a subordinate military officer, stationed at the old post at the mouth of the river and known as Fort Requa.

By section two of the act of April 8, 1864 (13 Stat., 39), it was provided that the President may, at his discretion, set apart "not exceeding four tracts of land," in California, "to be retained by the United States for the purposes of Indian reservations," &c. Said tracts may include existing reservations, which may be enlarged to the complete adaptation for the purposes intended. The third section of the act provides, that the reservations in California, "which shall not be retained for the purposes of Indian reservations, under the provisions of the preceding section," shall be surveyed and divided into lots and parcels and offered

at public sale by the Commissioner of the General Land Office, and "thence afterwards shall be held subject to sale at private entry," &c.

When this act was passed there were four Indian reservations in California, viz: the Klamath River, Mendocino, Smith River, and Round Valley; the latter of which, embracing an area of about 25,000 acres, was set apart by order of the Secretary of the Interior, in 1856. (H.Ex.Doc., 33, 1st Sess., 50th Cong.) The Smith River and Mendocino reservations were discontinued by the Indian appropriations act of July 27, 1868 (15 Stat., 221-'3). On August 21, 1864, State Superintendent Wiley notified settlers in the Hoopa Valley to make no further improvements thereon, as he had selected it as one of the four reservations authorized by the act of 1864, the metes and bounds to be thereafter established, subject to the approval of the President (Ex. Orders, p.301). Notwithstanding there had been no executive order setting apart or retaining, under the act of 1864, either the Round or Hoopa Valley reservations—there being only the original withdrawal of the first in 1856, and the above notice of the State Superintendent as to the second—Congress recognized the existence of both, as subsisting legal reservations, and made appropriations for them as such. (15 Stat., 221. 16 Ib., 37.) It was not until June 2, 1876, that the President's order was made formally setting apart the Hoopa Valley, by exterior boundaries and by specified acreage, "as one of the Indian reservations authorized to be set apart, in California, by act of Congress, approved April 8, 1864." (Ex. Orders, p.302). No order, by the President or other officer, appears to have been issued, either setting apart or retaining the

Round Valley reservation, under the act of 1864, as it was established in 1856 by order of the Secretary of the Interior. But, on March 30, 1870, by order of the President, said reservation was so enlarged as to include the whole valley. By act of March 3, 1873 (17 Stat., 633), the boundaries were changed so as to add to it about 77,000 acres, and by executive order of July 26, 1876, another addition was made, whereby the area was enlarged to about 102,000 acres.

On January 31, 1870, the President's order was issued, setting apart the San Pasqual and Palo Valleys as a reservation for the Mission Indians, and on February 17, 1871, another order revoked the withdrawal and restored the lands to the public domain. On December 27, 1875, the President ordered nine different non-contiguous tracts to be set aside "as reservations," respectively, for Indians from nine different missions, as specified.

On May 15, 1876, eight other tracts were, in the same way, ordered to be set apart for the foregoing and certain other specified Indians. On May 3, 1877, certain of said lands were, in like manner, ordered to be restored to the public domain. August 25, 1877, a further withdrawal in the same way was made for said Indians. Orders of the President were issued September 29, 1877, January 17, 1880, March 2, 1881, March 9, 1881, June 22, and July 22, and July 24, 1882, February 5, and June 19, 1883, January 25, and March 22, 1886, either adding to or taking away from and changing the lines of the tracts theretofore ordered to be reserved, until now there are nineteen different and non-contiguous tracts held in reservation for Mission Indians, some of them being about one hundred

miles apart, and these are held to constitute one of the four reservations authorized by the act of 1864. The Executive has so recognized it, in administering Indian affairs, and Congress has concurred in this construction by annual appropriations for the support of the Indians on said Mission Reservation and the officers in charge.

The Tule River Reservation was set apart by Executive order of January 9, 1873, and on October 3d following, this order was canceled and a new one issued by the President changing the boundaries and setting apart the described lands as the "Tule River Indian Reservation," and on August 3, 1878, by another Executive order, a portion of the described land was taken out of reservation and restored to the public domain. The foregoing matters are all contained in the reports of the officers of the Indian Office, annually communicated to and therefore within the knowledge of and it is to be presumed approved by Congress when the annual appropriations were subsequently and continuously made for these four reservations of Hoopa Valley, Round Valley, The Mission and Tule River.

It is therefore fair to adopt this approval, by Congress, of the action of the officers, in the premises, as a legislative construction of the act of 1864. Three conclusions inevitably flow from such construction: 1, that no formal order of the President retaining an existing reservation was deemed necessary, but its actual retention by the officers of the Indian Bureau was sufficient to constitute it one of the four authorized reservations; 2, that contiguity was not an essential, but a reservation might be composed of several noncontiguous parcels of land; and, 3, that the Executive authority, in that respect, was not exhausted when once

exercised in the setting apart of "four tracts" or parcels of land, as reservations; but that discretion continued, and yet exists, to change, add to, diminish or abolish reservations and establish others, as may seem most promotive of the public interests.

In relation to the Klamath River reservation, as in that of the Round Valley, no formal or written order appears to have been issued for its retention. In both of these instances the Indian office retained possession and control of the former reservations, making no change in their condition, status or management, further than that they passed under control of the one State Superintendent as required by the act of 1864. The Indians remained in the occupation of both of these reservations, and yet so occupy them alone, except so far as that occupation may have been intruded upon by individual white men, under color of claims. Congress has made annual appropriations for support of the Indians on the Round Valley reservation, but none for those on Klamath, and for the all sufficient reason that the latter are self-supporting and have never cost the government a dollar in this respect.

The special circumstances under which the Department retained the Klamath River reservation are more fully shown by the following recital.

From a letter of the Secretary of the Interior to the Senate, dated February 13, 1889, and accompanying documents, which will be found in Senate Executive Document, No. 140, 2d Sess., 50th Cong., it appears that, on January 19, 1865, Mr. Wiley, the Superintedent of Indian Affairs in California, under the provision of the act of 1864, *supra* (the same officer who gave the notice to the settlers in

Hoopa Valley), wrote to the Commissioner of Indian Affairs that it was his intention to extend the Hoopa Valley reservation so as to include the Klamath River reservation, "or it will be kept up as a station attached to that reservation and under control of the same agent," p. 20. This disposition by Superintendent Wiley was approved by the Commissioner of Indian Affairs, and is referred to in his annual report of 1865. See Doc. 140 *supra* p. 21.

On August 14, 1877, the Commissioner wrote to the Secretary:

"The agency at this (Klamath River reservation) was removed to Smith River Indian reserve, but the Indians refused to leave, and being self-sustaining, living principally upon fish, it was not deemed advisable to recommend its restoration to the public domain."

Again, the same officer writes to the Secretary March 8, 1878, p. 21,ib.

"When the Klamath agency was removed to Smith River in 1862, there was but one band of Indians—Humboldts—numbering about five hundred persons, who consented to the removal thereto, or to the subsequent removal to Hoopa Valley. There were thus left on the Klamath River some 2,000 Indians over which this office has since exercised no jurisdiction, and who have been entirely self-supporting. They rely for subsistence mainly upon the salmon which abound in the Klamath River. In view of these facts the reservation should, in my opinion, be preserved intact until some measures are devised for the permanent settlement of these Indians."

In 1883 Mr. D. B. Hume submitted a proposition to lease the salmon fisheries of the Klamath River, with the privilege of cutting timber for fuel and in connection with the fishing privilege. The Commissioner of Indian Affairs, in his reply, July 23, 1883, said:

"No such proposition can be entertained. It would be against usage and at variance with the policy of the Department in control and management of Indian Affairs. The permanent settlement of the Indians residing upon said reservation, and the disposal of so much of the reservation as may not be needed for that purpose, are matters engaging the attention of the Department at this time. What the final result may be I am unable to say. The reservation *is still in a state of Indian reservation*, and must so remain, uninterfered with until otherwise ordered by competent authority." p. 11.

On June 25, 1885, Special Agent Folsom recommends the enlargement of the original reservation by extending it, along both sides of the Klamath River, to the Hoopa Valley reservation, and that all squatters, &c. be immediately removed, p. 10.

On April 4, 1888, the Commissioner of Indian Affairs, writing to the Secretary of the subject, says, on page 20:

"Now it appears that in carrying out the provisions of the act of April 8, 1864, the Hoopa Valley reservation was established. . . .; the Round Valley already in existence was retained, and it was the declared purpose and intention of the superintendent of Indian affairs in California, who was charged with the selection of the four reservations to be retained, to extend the Hoopa Valley reservation so as

to include the Klamath River reservation, or else keep it up as a separate reservation, and have a 'station,' or sub-agency there, to be under the control of the Hoopa Valley reservation."

In his annual report for 1888 the Secretary of the Interior, on page 76, thereof says:—

"Indians have continued to reside on the Klamath River lands, and those lands have been and are treated as in a state of reservation for Indian purposes, the jurisdiction is under the U. S. Indian agent for the Hoopa Valley agency."

More extracts of the same sort might be given, but would unduly amplify this communication. The foregoing are sufficient to serve the purpose in view.

In addition to the foregoing, it may be stated that, on March 20, 1883, the Commissioner of Indian Affairs submitted to the Secretary of the Interior the report of the Indian Agent at Hoopa Valley reservation, relative to the invasion by whites of the Klamath River reservation, and recommended the prosecution of the intruders under section 2118 of the Revised Statutes, and also that steps be taken to allot the lands in severalty to the deserving Indians, so that they may be secured in their possessions.

Secretary Teller, on March 26, 1883, concurred in the recommendation to make allotments, and directed that a special agent be authorized to aid the Indians in making their selections. And when the selections were made and reported, the Secretary said, "further action will be had on the question of restoring the remainder of the reservation to the public domain." In the same year, on the appeal

of John McCarthy from the decision of the Commissioner of the General Land Office, affirming that of the local officers, at Humboldt, California, rejecting his application to make pre-emption filing on a tract within the limits of said reservation, Secretary Teller approved of the former action in the case, and held that since the passage of the act of 1864 the lands in question had been and were regarded as in reservation, and "that various allotments within its limits have recently been made, . . ., and that when the selections within said reservation were all made," he "would consider the question of restoring the remainder to the public domain." (2 L.D., 460.)

It was then believed that the public surveys had been extended over said lands; but when it was attempted to make the allotments it was found that the reported surveys were so erroneous and fraudulent that no further action could be taken under them. Another survey was made in 1886, which, having been examined in the field by a special agent, has been approved by the Surveyor-General of California, and the Commissioner of the General Land Office, as I have learned informally.

By circular of May 31, 1884 (3 L.D., 371), the local land officers were instructed to permit no entries or filings upon lands in the possession of Indians. On October 26, 1886 (6 L.D., 341), the attention of the officers was again called to this circular, and its instructions were repeated with emphasis, and made "to apply to all lands occupied by Indian inhabitants in any part of the public land states or territories of the United States."

This is the status of these lands, so far as the Interior Department, with its jurisdiction over Indian affairs and over the public lands, has authority to establish that status.

These facts show that the reservation in question has never been relinquished by formal or informal act of the Indian Office, and no steps whatever have been taken looking to its release from Indian reservation and occupancy, and its survey, appraisement and sale under the act of 1864. On the contrary, it appears that it was always the purpose of the Indian officers to retain it as a reservation. When the Hoopa Valley reservation was selected, some eighteen miles distant, the then superintendent of Indian affairs in California said it was the intention either to extend it so as to include the Klamath River reservation, or else retain the latter as an outlying annex to the former, with a station or sub-agency there, under control of the agent at the Hoopa Valley reservation. This last plan seems to have been adopted, for, as such annex to the Hoopa Valley reservation, with a sub-agency thereof in charge, jurisdiction over it has ever since and is now claimed and exercised by the Indian office, and this Department recognizes the correctness of that claim.

Pushing aside all technicalities of construction, can any one doubt that for all practical purposes the tract in question constitutes an Indian reservation? Surely, it has all the essential characteristics of such a reservation; was regularly established by the proper authority; has been for years and is so occupied by Indians now, and is regarded and treated as such reservation by the executive

branch of the government, to which has been committed the management of Indian affairs and the administration of the public land system.

This being so, Congress is the only authority which is competent to overrule the executive action in the premises and dis-establish said reservation. Has it done so? It has been shown that of the four reservations in California at the date of the passage of the act of 1864 two—those of Smith River and Mendocino—were discontinued by express legislative enactment, whilst there has been no such express enactment as to the other two—Klamath River and Round Valley. It is said, however, that the Klamath River reservation was abolished by section three of the act of 1864. Is this so?

In looking at these questions relating to Indians and to Indian lands, the anomalous condition of this people and the peculiar relations in which they stand towards the government should never be lost sight of, but always kept prominently in view, and be regarded in construing legislation affecting them. And if a statute admits of two constructions, or, if reading it in this light, a reasonable construction favorable to the Indians can be placed upon it, the latter should be adopted. For, as the Supreme Court said in Beecher vs. Wetherby, 95 U. S., 525, discussing a question relating to Indian lands, "it is to be presumed, that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race."

The right of the Indians to use and occupy portions of the territory of the United States has been recognized as

both legal and just, and this "right of the Indians to their occupancy is as sacred as that of the United States to the fee, but it is only a right of occupancy." Cook v. United States, 19 Wall., 593.

In the present instance, the Indians have lived upon the described tract and made it their home from time immemorial; and it was regularly set apart as such by the constituted authorities, and dedicated to that purpose with all the solemnities known to the law, thus adding official sanction to a right of occupation already in existence. It seems to me something more than a mere implication, arising from a rigid and technical construction of an act of Congress, is required to show that it was the intention of that body to deprive these Indians of their right of occupancy of said lands, without consultation with them or their assent. And an implication to that effect is all, I think that can be made out of that portion of the third section of the act of 1864 which is supposed to be applicable and is quoted as follows:—

"*And be it further enacted*, That the several Indian reservations in California which shall not be retained for the purposes of Indian reservations under the provisions of the preceding section of this act, shall, by the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, be surveyed into lots of parcels of suitable size, and as far as practicable in conformity to the surveys of the public lands, which said lots shall, under his direction, be appraised by disinterested persons at their cash value, and shall thereupon, after due advertisement, as now provided by law in case of other public lands, be offered for sale at public outcry, and thence

afterward shall be held subject to sale at private entry, according to such regulations as the Secretary of the Interior may prescribe."

Certainly, it does not, upon the selection of four reservations, by express words, *ipso facto*, dis-establish all other Indian reservations within the State of California. Nor does it in express terms declare that all except the four are to be thereafter abolished. The implication, however, is clear. When they are to be abolished is not declared, but the matter was properly confided to executive discretion. And this was wise, inasmuch as a re-organization of the Indian system in California was the motive for the act and the purpose to be accomplished. In order to carry out successfully a scheme, involving tact and management, necessarily much was to be entrusted to the sound judgment of the executive officers.

Nor does the act say that the four new reservations are each to consist of one compact or solid body, block or piece of land. The word used is "tract." Worcester defines the word to mean "a quantity of land, a region, a district;" and Webster as "a region or quantity of land or water of indefinite extent." There is therefore nothing in the word "tract" on which to found a prohibition against each of the four new reservations being composed of conveniently adjacent, but non-contiguous, pieces or parcels of land. Indeed, there are reasons why it may be supposed Congress contemplated the exercise of just such discretion by the executive. The Indians scattered throughout California were composed of different tribes; some of these were the most fierce of that savage race, and the hereditary enemies of other tribes there. The Hoopa Valley reservation, as

shown by the report of the Commissioner of Indian Affairs, for 1864, pp.116 and 134, ever since the advent of the Americans to California, had been the home of the Modocs, the fiercest and most hostile of the Indian tribes upon the Pacific coast. They had for years waged a most destructive warfare, which was only brought to a close after a vigorous campaign, accompanied by much loss of life, when the remnant of the Indians, though untamed, ceased hostilities and returned to their home in the Hoopa Valley.

It would hardly be the part of wisdom to place the peaceful and nearly civilized Klamath River Indians upon the same reservation with the savage and warlike Modoc, where there was but one hunting ground and one fishing stream to be used in common within the same boundaries. Instances like this, which must have been known to Congress, would seem to suggest the necessity of allowing a discretion to the executive which the nature of the case demanded.

The executive department seems to have had no doubt of its authority to set apart non-contiguous tracts as one reservation. The Klamath River reservation is not the only instance in which such action was taken. The Mission reservation, created under the same act, is composed of nineteen different and non-contiguous parcels of land, as heretofore shown, withdrawn on orders of four different Presidents, the last order of withdrawal being made as late as June, 1883. Independent of the legislative construction heretofore referred to, it seems to me that this contemporaneous and continued construction of the act in question by the officers charged with its execution ought to

be conclusive on the subject, in the absence of prohibition to the contrary. United States v. Holliday, Wall., 419, and United States v. Philbrick, 120 U.S., 59.

It is true that there does not appear to be any formal written order by the President setting apart or retaining the lands in question, nor does the act direct or demand in terms such formality. But if such requirement be necessary, the Secretary of the Interior and the Commissioner of Indian Affairs show most unequivocally that the lands in question were in fact retained as, and are now, a part of the Hoopa Valley reservation, and the presumption of law is that this was done by the direction of and with the approval of the President. Said the Supreme Court in Wilcox v. Jackson, 13 Peters, 513:

> "The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. Both military posts and Indian affairs, including agencies, belong to the War Department. Hence, we consider the act of the War Department in requiring this reservation to be made, as being in legal contemplation the act of the President, and, consequently, that the reservation thus made was in legal effect a reservation made by order of the President, within the terms of the act of Congress."

Considering the foregoing matters, it is my opinion that the Klamath River reservation may be legally considered a part of the Hoopa Valley reservation, one of the four Indian reservations authorized by the act of 1864, *supra*, and consequently that this Department is clothed with authority to remove intruders therefrom; and I so answer the first inquiry of the Commissioner of Indian Affairs.

If I am correct in the above, it follows that the lands within said reservation should be allotted, if allotment be made, to tbe Indians thereon, under the first section of the allotment act of February 8, 1887 (24 Stats., 388), and so answer the second question of the Commissioner.

I am aware that this conclusion differs from the views expressed by Judge Hoffman in the case of United States v. Forty-Eight Pounds of Rising Star Tea, Decided June 7, 1888, and reported in 35 Fed. Rep., 403. Acknowledging the great ability and long experience of that eminent jurist, impressed fully with the persuasive force of a ruling, emanating from such a source, yet, after carefully reading his opinion, I am not convinced that the conclusions above stated are erroneous.

The judgment rendered in that case is probably correct, but I do not assent to the reasoning of the opinion. The case arose upon a libel filed by the United States against certain packages of goods, belonging to one R. D. Hume, seized because of an alleged violation of Section 2133 of the Revised Statutes, which provided that:

> "any person other than an Indian who shall attempt to reside in the Indian country as a trader, or to introduce goods or to trade therein without such license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of five hundred dollars."

In relation to the facts, on which condemnation was asked, Judge Hoffman says, among other things:

> "The nature of the trade carried on by the claimant is not disputed. He has not resided on the reservation lands and has made no settlement therein. At the

> proper season he proceeds with his vessel to the river and employs the Indians to fish for him, supplying them with seines and other appliances. He pays them 'in trade,' furnishing them with articles composing the cargo of his vessel."

On these facts, "not disputed," it would seem the Court was right in dismissing the libel, for the alleged offense of trading was, from this statement, committed on board of a vessel in the Klamath River, a navigable stream, of the State of California, which is neither in the Indian country, nor within the Indian reservation, that being "a strip of territory commencing at the Pacific Ocean and extending one mile in width *on each side* of the Klamath River." That the river is navigable, as a matter of fact, admits of no question, since the presence of the boat proves its navigable character at that point; moreover, the Legislature of California, by act of April 23, 1883, proclaimed said river to be navigable waters of that State, from the ocean to the town of Orleans Bar, a point considerably east of the place where the alleged offense of trading was committed.

California was admitted into the Union on September 9, 1850, and thereupon "absolute property in, and domain and sovereignty over, all soils under the tide waters within her limits passed to the State," subject to the paramount right of navigation. Weber v. Harbor Commissioners, 18 Wall., 57, 65. In like manner the States own the tide waters and the fish therein, for use of its citizens. Martin v. Waddell, 16 Peters, 367-410; Mumford v. Wardell, 6 Wall., 423-436. It results therefore, that the executive order of November 16, 1855, establishing the Klamath River reservation, if it had so declared, would have been ineffective to include

the bed and waters of that river as part of the Indian reservation. These views are sustained by an opinion of Mr. Attorney General Garland, sent to this Department on June 11, 1887, and to be found on page 13 of Senate Executive Document, 140, 2d Sess., 50th Cong. He there says that the Klamath River is a navigable stream, and there is no warrant for the removal by Federal authority of persons, who resort to and use the water thereof for the purpose of taking fish.

For these reasons, the judgment of the court, in the case referred to, may be sustained, and probably the Assistant Attorney General of the United States was influenced by similar considerations when he declined to prosecute an appeal from said decision, as recommended by Secretary Vilas, as I am informed is the case.

Inasmuch as the Klamath river is not within the Indian country nor the Indian reservation of "one mile in width on each side" thereof, there was and could be no question properly before the court as to the legal or actual status of that reservation; and the utterances of the Judge in relation thereto were *dicta* and not essential to the decision of the case before the court.

In the case of Carroll v. Carroll (16 How., 275-287), the Supreme Court, speaking on this subject, said that, if the construction given by the court of a state to one of its statutes:

> "was not a matter in judgment, if it might have been decided either way without affecting any right brought into question, then, according to the principles of the common law, an opinion on such a question is not a decision."

In the case under consideration, since it was found that the trading was not done within the Indian reservation, the court might have decided either way, that the land in question was or was not a legal reservation, without affecting the right of Hume to trade with the Indians on the Klamath river, and its judgment upon the facts found would necessarily have been the same. Therefore, it is apparent under the rule in Carroll v. Caroll that the opinion of Judge Hoffman was not a decision of a question properly before him. That opinion seems also to conflict with decisions emanating from the Supreme Court. One citation is sufficient.

In the case of United States v. Holliday (3 Wall, 407-419), the defendant was indicted for selling liquor to a Winnebago Indian, under the charge of an Indian agent, which, by the act of February 13, 1862 (12 Stat. 339), was made a penal offense. It was conceded that the sale took place in an organized county of the State of Michigan, and not in the Indian country, or on a reservation; that the purchaser was an individual land-owner and was a voter under the laws of that State. It was claimed by defense that all this, together with a treaty containing provisions to that end, showed a dissolution of the tribal relations of said Indians, and, therefore, the purchaser could not be held to be in charge of an Indian agent. But it appearing in the record that the Secretary of the Interior and the Commissioner of Indian Affairs had decided that the tribal organization yet existed, the court said:

> "In reference to all matters of this kind, it is the rule of the Court to follow the action of the executive and other political departments of the government,

whose more especial duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this Court must do the same."

Judge Hoffman concedes that the lands in question are yet in reservation, though not for Indian purposes; that they constitute a reservation in fact, but not in law; and the principal reason why the legality is questioned appears to be because there was no formal executive order setting apart or retaining it as part of the Hoopa Valley reservation. This difficulty may yet be removed by the President issuing a formal order, out of abundant caution, setting apart the Klamath river reservation, under the act of 1864, as part of the Hoopa Valley reservation, or extending the lines of the latter reservation so as to include, within its boundaries, the land covered by the former reservation, and the intermediate lands, if the title to the last be yet in the United States. Such an order would be in accordance with the precedents in relation to the Tule river, Round Valley, and Mission reservations, the legality of which, as herein shown, has been repeatedly recognized by the legislative and executive branches of the government. I am therefore of the opinion that the Hoopa Valley reservation "may be legally extended, so as to cover the ground of the Klamath reservation."

Herewith are returned the papers transmitted.

Very respectfully,
/s/ GEORGE H. SHIELDS
Assistant Attorney General.

Appendix 5

United States
Department of the Interior
Office of the Solicitor
Washington, D.C. 20240

January 13, 1982

[Seal]

Memorandum

To: Chief, Law Enforcement, Fish and Wildlife Service

From: Solicitor Jean Kigley

Subject: Request to Prosecute American Indians

By memorandum of January 6, 1982 to the Assistant Solicitor, Fish and Wildlife, you requested permission to refer certain alleged violations of California and Oregon fish and game laws to appropriate state officials and to assist any subsequent prosecution of the concerned individuals. Assistance would also be provided by Fish and Wildlife Service law enforcement agents serving arrest and search warrants as deputized state enforcement officials in cooperation with state enforcement officers, providing evidence to state officials and appearing as witnesses in State prosecutions.

The alleged violations involve American Indians, members of either the Hoopa Valley Tribe or the Yurok Tribe of the Hoopa Valley Reservation, California. These individuals are covered by FWS enforcement investigation file

number INV 3-1497, reports 4, 6, 8, 12-15, 18, 19, 20-26, 35, 36 and 45.[1]

The alleged violations are:

California

Fish and Game Code 8685.6—unlawful sale or possession for sale of salmon, steelhead, or striped bass taken in California waters by the use of a gill net.

Fish and Game Code 8434—unlawful sale or purchase of fresh, canned, or cured fish taken in the Klamath River District.

Oregon

Commercial Fishing and Fisheries, Title 42, Chapter 509.105—unlawful possession, importation into the State or transportation within the State of Oregon of food fish which have been unlawfully taken or transported under the laws of another State.

Commercial Fishing and Fisheries, Title 42, Chapter 509.011—unlawful (a) taking or transportation of food fish taken during the closed season, (b) purchase, receipt, possession, or sale of food fish caught during a closed season, and/or (c) making use of a vehicle for the transportation of food fish unlawfully taken during a closed season.

---

[1]I have been informed that two individuals included in your request are American Indians, but are not members of the Hoopa Valley Tribe or the Yurok Tribe and that your request does not extend to these individuals. Consequently, the authority granted by this memorandum includes only those individuals named in the above listed investigative reports who are members of the Yurok or Hoopa Valley Tribes.

It is my understanding that evidence of the alleged violations by the individuals covered by the above listed investigative reports has been gathered as a result of an undercover investigation conducted jointly by FWS law enforcement agents and fish and game officials of the States of California and Oregon.

Based on a review of the materials provided with your request, I authorize you to aid state officials in the prosecution of the alleged violations committed by the concerned individuals. Pursuant to this authorization, FWS law enforcement agents may assist the states by referring matters for possible prosecution, providing evidence and appearing as witnesses as the States may request. In granting this authorization, I note that, although the concerned individuals might possess fishing rights on the Hoopa Valley Reservation, *see Mattz v. Arnett,* 412 U.S. 481 (1973), these rights do not presently include the commercial sale of fish caught within reservation boundaries, *see* 25 C.F.R. § 258.8.

ORIGINAL

No. 84-453

Supreme Court, U.S.
FILED
NOV 5 1984
ALEXANDER L. STEVAS
CLERK

IN THE SUPREME COURT

Of The

UNITED STATES

OCTOBER TERM, 1984

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vs.

WALTER McCOVEY, JR.,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The only question properly before the Court is as follows:

Is California's absolute, permanent ban on the off-Reservation sale of fish caught in the Klamath River by Indians of the Hoopa Valley Reservation preempted by, inter alia, the regulations adopted by the Secretary of the Interior to govern the exercise of the fishing rights reserved to the Indians of the Reservation by the federal statutes and Executive Orders by which the Reservation was created?

OPINIONS BELOW

The decision of the Supreme Court of California is reported at 36 Cal. 3d 517 and 205 Cal. Rptr. 643. The decision of the Court of Appeal is reported at 145 C.A. 3d 190 and 193 Cal. Rptr. 293. The decision of the Superior Court for the County of Santa Clara is unreported, but is set forth at pp. A1-4 of the Appendix hereto.

APPLICABLE LAWS

In addition to the federal laws set forth in the Petition, Respondent contends that the following laws and regulations, the texts of which are set forth at pages A5-16 of the Appendix hereto, are applicable:

1. Act of March 3, 1853, 10 Stat. 238.
2. Act of March 3, 1855, 10 Stat. 699.

3. 25 C.F.R. Part 250 (1982).

STATEMENT OF THE CASE

Petitioner's Statement of the Case substantially misstates and distorts the evidence in the record and the proceedings below. Similar misrepresentations occurred in both the Court of Appeal and the California Supreme Court. On each occasion, Respondent McCovey brought those misrepresentations to the attention of the court and counsel.

Petitioner's "Supplemental Brief" reluctantly discloses several deliberate previous omissions; however, even with those disclosures, Petitioner's description of this case remains misleadingly inaccurate and incomplete. Accordingly, Respondent hereby sets forth an accurate Statement of the Case.

1. Nature of the Controversy

The Hoopa Valley Indian Reservation in Northwestern California consists of a tract of land extending for one mile on each side of the Klamath River from the Pacific Ocean to the confluence of the Klamath and Trinity Rivers about 50 miles upstream, at which point it widens into a twelve-mile square. The Reservation was created by Presidential Executive Orders in 1855, 1876 and 1891, pursuant to federal statutes enacted in 1853, 1855 and 1864. The history of the Reservation and the purposes for which it

was created were described and determined in, inter alia, Mattz v. Arnett, 412 U.S. 481 (1973); Arnett v. 5 Gill Nets, 48 C.A. 3d 454 (1974), cert. den., 425 U.S. 907; Donnelly v. United States, 228 U.S. 243, modified on den. of pet. for reh., 228 U.S. 708 (1913); and Short v. United States, 486 F. 2d 561 (Ct. Cl., 1973).

In Mattz v. Arnett, supra, this Court held that the former Klamath River Reservation (the portion of the Reservation between the Pacific Ocean and a point 20 miles upstream) remains "Indian country" as defined in 18 U.S.C §1151. On remand, the California Court of Appeal determined in Arnett v. 5 Gill Nets, supra, that the federal statutes and Executive Orders under which the Reservation had been created reserved to the Indians thereof a federally-protected right to fish in the Klamath River, and thus that application of the State Fish and Game Code to Indians fishing in the Klamath River and other Reservation waters was precluded by force of the Supremacy Clause, U.S. Const. Art. VI Cl.2. Arnett v. 5 Gill Nets, supra, at 461.

In 1977, the Secretary of the Interior promulgated interim regulations to govern Indian fishing on the Hoopa Valley Reservation until such time as a Reservation-wide Tribal government could regulate the Indian fishery. Those regulations specifically allowed the use of gill nets, and authorized Indian fishers to catch up to five anadromous fish per day for purposes of sale. 25 C.F.R. §258.5, 42

F.R. 40904-5, as corrected at 42 F.R. 47555. In those and other respects, the regulations authorized conduct which otherwise would have violated the California Fish and Game Code and regulations made thereunder.

In 1978, the Secretary of the Interior (hereinafter "the Secretary") adopted a much more comprehensive set of regulations. Those regulations established eligibility criteria for Indian fishers and a system of identifying fishers and fishing gear; limited fishing time, places and permissible fishing methods; and established a Court of Indian Offenses under 25 C.F.R. Part 11 to punish Indians who violate the regulations. 25 C.F.R. Part 258 (1978).

The Secretary's 1978 regulations explicitly permitted the sale of fish both on and off-Reservation. The regulations required that an on-Reservation fish buyer possess or have applied for an Indian trader's license; no restriction was imposed upon off-Reservation sales, other than that the Indian seller had to record such sales and report them to the U.S. Fish and Wildlife Service on a weekly basis. 25 C.F.R. §258.13, 43 F.R. 30047-53, July 13, 1978.

The 1978 fall Chinook salmon run was smaller than had been anticipated, due to a severe drought. In response, the Secretary's representative imposed a temporary moratorium on fish sales. That moratorium was incorporated in the revised regulations adopted by the Secretary in 1979, 44 F.R. 17144-

51, March 20, 1979, and has remained in effect ever since, pending completion of an Environmental Impact Statement on Indian commercial fishing. See, e.g., 46 F.R. 56057-8, November 13, 1981.

The remainder of the Secretary's Hoopa Valley Indian fishing regulations, recodified in 1982 at 25 C.F.R. Part 250, have evolved into an elaborate, comprehensive and rigorous scheme for limiting and monitoring the impact of the Indian fishery on the salmon and other fish resources of the Klamath River and its tributaries within the boundaries of the Hoopa Valley Reservation. The regulations govern Indian possession and disposition of Reservation-caught fish even beyond Reservation boundaries. 47 F.R. 32844 et seq., July 29, 1982.

Respondent, Walter McCovey, Jr., is a Yurok Indian of the Hoopa Valley Reservation. At all times relevant hereto, Mr. McCovey was (and remains) the holder of a Hoopa Valley Reservation Fisher's Identification Card issued by the United States Department of the Interior, Bureau of Indian Affairs, pursuant to 25 C.F.R. §§250.5 and 250.6.

In September, 1980, Mr. McCovey was arrested along with a co-defendant, Lance Wilkie, in San Jose, California by California authorities who, through undercover intermediaries, had arranged to purchase from Mr. McCovey approximately 100 Chinook salmon which he had caught in the Klamath River using a gill net. The fish and the proceeds

of the sale were confiscated and Mr. McCovey was charged with violating California Fish and Game (hereinafter "F. & G.") Code §§8685.6 (felony sale or possession for sale of salmon, steelhead or striped bass caught in California waters by means of a gill net) and 2002 (misdemeanor possession of fish taken in violation of any provision of the F. & G. Code, or of any regulation made thereunder), and California Penal Code §182 (felony conspiracy to violate F. & G. Code §2002).

Mr. McCovey moved to dismiss the information. The motion was based on the grounds that enforcement of restrictions on the possession and/or disposition of fish caught by Reservation Indians in Reservation waters impermissibly infringes upon and is preempted by Respondent's federally-reserved fishing rights as an Indian of the Hoopa Valley Reservation, and the Hoopa Valley Reservation Indian fishing regulations adopted by the Secretary of the Interior.

In response to the motion to dismiss, Petitioner conceded that the fish were caught in the Klamath River within the boundaries of the Reservation, and that Respondent McCovey, as an Indian of the Reservation, has a federally-reserved right to fish in the Klamath River and even to sell such fish within the boundaries of the Reservation free of State regulation:

> Counsel [for defendants] in their Points and Authorities argue strenuously that the fish herein

> were caught on the Hoopa Valley Indian Reservation -- and the People agree. Mattz v. Arnett (1973) 412 U.S. 481 clearly states that the Hoopa Valley Indian Reservation begins at the Pacific Ocean and continues along the Klamath River until the confluence of the Klamath and Trinity Rivers.
>
> The defendants next argue that they have a federally protected right to fish by gill nets from the Klamath River and sell the same to sustain themselves. The People similarly agree that the defendants' right to fish in this manner in the reservation is controlled federally and California may not infringe thereon. [Emph. added]. [C.T. p. 103, l. 1-11].

The trial court independently reached the same conclusion:

> It is equally clear, however, that Yurok Indians have the right, under federal law, to catch fish in this manner on their reservation, and the prosecution does not contend to the contrary. Mattz v. Arnett, (1973) 412 U.S. 481; Arnett v. Five Gill Nets (1975) 48 Cal. App. 3d 454). [C.T.p. 142, l. 13-17].

On that ground the Superior Court dismissed the charges of violation of F. & G. Code §2002 and Pen. Code §182. C.T. p. 143. Petitioner did not appeal from that order, and the trial court's decision on that issue now is final.

While the Superior Court held that Petitioner could not regulate either Respondent's taking of fish in the Klamath River or the off-Reservation possession of such fish, it accepted Petitioner's contention that the Indians of the Reservation do not have a federally-reserved right to sell Reservation-caught salmon beyond Reservation boundaries. [C.T. p. 144]. Thus, the trial court denied Respondent's motion to dismiss Count 1 of the Information [C.T. p. 144],

and convicted Respondent and his co-defendant of violating F. & G. Code §8685.6. [C.T. p. 147].

Respondent was sentenced to a suspended term in State prison, three years of formal probation, 90 days in the County Jail and a fine of $2,500 (plus a penalty assessment). [C.T. p. 152].

Respondent and his co-defendant appealed their conviction. The Court of Appeal consolidated their case with seven other cases involving essentially the same legal issues. On appeal, Petitioner raised for the first time the questions whether the Klamath River is within the boundaries of the Hoopa Valley Reservation, and whether the Indians of the Reservation have a federally-protected right to fish in the Klamath River. Petitioner also requested leave to put into the record numerous exhibits, and affidavits of potential witnesses.

The Court of Appeal specifically denied Petitioner's evidentiary requests. See Order of May 4, 1983, included in the Appendix at p. A20. One reason for that denial might have been that Calif. Penal Code §999a limits the court reviewing the denial of a motion to set aside an information to the record which was before the committing magistrate. Buck v. Superior Court, 245 C.A. 2d 431 (1966); People v. McKee, 267 C.A. 2d 509 (1969); People v. Taylor, 250 C.A. 2d 367 (1967).

The Court of Appeal affirmed Respondent's conviction on the ground that the Secretary of the Interior's Hoopa Valley Reservation Indian fishing regulations had extinguished any right which the Indians of the Reservation otherwise might have had to sell fish caught in Reservation waters. In separate decisions, the Court of Appeal denied the pretrial relief sought in the other consolidated cases.

Petitions for hearing were filed in the California Supreme Court in this case and the other cases which had been consolidated in the Court of Appeal. Those petitions were granted. After hearing argument only in McCovey and Wilkie, the California Supreme Court reversed Respondent's conviction on the ground that the creation of the Hoopa Valley Reservation by Executive Orders issued pursuant to Acts of Congress had reserved to the Indians thereof the right to fish in the Klamath River, and thus that State regulation of any aspect of that activity -- including off-Reservation sales -- has been preempted by the comprehensive Hoopa Valley Indian fishing regulations duly promulgated by the Secretary of the Interior.

Petitioner and Mr. Wilkie both filed petitions for rehearing; both were denied. The other cases with which this case had been consolidated in the Court of Appeal were transferred to the Court of Appeal for further consideration in light of People v. McCovey.

The Petition contains several additional misstatements, inaccuracies and allegations unsupported by any evidence of record. Petitioner's descriptions of State and federal regulatory efforts are not supported by the evidence in the record, and in large measure simply are untrue. Indeed, had Petitioner utilized the opportunity to raise these issues in the trial court, the evidence would have shown that destruction of salmon habitat by dams, mining, logging and roadbuilding are the major causes of much of the original decline in the Klamath River basin's once-abundant salmon resources.

The evidence would have shown that the recovery of the Klamath's salmon resources to the level of abundance which the remaining habitat can support has been prevented in large measure by Petitioner's encouragement or toleration of excessive and needlessly destructive ocean harvests of salmon destined for the Klamath, and its failure to adequately protect against further habitat despoliation. Finally, the evidence would have shown that the Indian net fishery on the Klamath River accounts for only a small percentage of the total annual harvest of Klamath River Chinook salmon.

Next, the Petition asserts (p. 4, n.2) that Mattz v. Arnett, 412 U.S. 481 (1973), "recently [was] declared to be of doubtful validity." In fact, in De Coteau v. District County Court, 420 U.S. 425 (1975), the Supreme Court stated

as to Mattz v. Arnett, supra, and Seymour v. Superintendent, 368 U.S. 351 (1962),

> "We adhere without qualification to both the holdings and the reasoning of those decisions." 420 U.S. at 447.

See also, Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 585-87 (1977).

Finally, the Petition refers to a purported memorandum from the office of the Solicitor of the Department of the Interior allegedly authorizing assistance to State officials in prosecutions for violating State fishing laws. That document was never admitted into evidence; indeed, Petitioner's request to include it in the record was specifically denied by the Court of Appeal.

Moreover, the unauthenticated document (the copy included in the Appendix is not accurate) was not authored by the Interior Solicitor, did not issue from the division of the Solicitor's office responsible for interpreting and protecting Indian fishing rights, and does not even purport to offer assistance in prosecutions of Indians for selling salmon caught in Reservation waters (the Klamath River extends far upstream of the Reservation).

In fact, the official position of the Secretary of the Interior was and is that the Indians of the Reservation have a federally-reserved right to sell fish caught in Reservation waters. 42 F.R. 40905; 43 F.R. 30048. In the

preamble to the Secretary's 1979 Hoopa Valley Reservation Indian fishing regulations, the Secretary explicitly stated that:

> "It is recognized that the right to fish commercially does exist and may be exercised at such time in the future when the fish runs can withstand the increased harvest. These rights will not be modified or extinguished by these regulations. [Emphasis added]. (44 F.R. at 17146.)"

The Secretary's above statement reiterates the position of the United States in the Memorandum filed by the Solicitor General in opposition to the petition for certiorari in Arnett v. 5 Gill Nets, No. 75-527.

ARGUMENT

INTRODUCTION

In the foregoing response to Petitioner's Statement of the Case, Respondent demonstrated that the Petition is so rife with deliberate omissions, mischaracterizations and outright misstatements of the fundamental facts and issues in this case as to warrant denial pursuant to Supreme Court Rule 21.5.

The Argument which follows explains why the doctrines of res judicata, collateral estoppel and waiver, and the California Supreme Court's adherence to this Court's principles of federal preemption of State jurisdiction over Indian rights and conduct also warrant denial of the Petition.

I. THE DOCTRINES OF RES JUDICATA, COLLATERAL ESTOPPEL AND WAIVER PRECLUDE PETITIONER FROM CHALLENGING

THE EXISTENCE OF RESPONDENT'S FEDERALLY-RESERVED RIGHT TO FISH IN THE KLAMATH RIVER WITHIN THE BOUNDARIES OF THE HOOPA VALLEY INDIAN RESERVATION.

A. Res Judicata

In the trial court, Respondent moved to dismiss the information. The motion rested on the grounds that the creation of the Hoopa Valley Reservation by Executive Orders issued pursuant to Acts of Congress reserved to the Indians thereof the right to fish in the Klamath River free of State regulation, and that the Secretary's Hoopa Valley Indian fishing regulations preempt whatever authority Petitioner otherwise might have to prohibit off-Reservation sale of fish caught in Reservation waters.

In its "Supplemental Brief," Petitioner belatedly and grudgingly admits that it affirmatively conceded Respondent's claim that he has a federally-reserved and regulated right to fish in the Klamath River and even to sell fish on the Reservation, and that Petitioner may not regulate the on-Reservation exercise of that right.

In its ruling on the motion to dismiss the Information, the trial court agreed that Respondent has a federally-reserved and regulated right to fish in the Klamath River free of State regulation. Thus, Petitioner was precluded from prosecuting Respondent for violating F. & G. Code §2002 and Calif. Penal Code §182. C.T. p. 141.

Under Calif. Penal Code §1238, Petitioner had the right to appeal from the order dismissing thess Counts. However, Petitioner did not appeal, and that order now is final.

Notwithstanding its own trial court concessions and the judgment of the trial court, Petitioner now contends that Respondent has no federally-reserved right to fish in the Klamath River, because, inter alia, the river is not within the boundaries of the Reservation.

Under the doctrine of res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Allen v. McCurry, 449 U.S. 90 (1980); Bernhard v. Bank of America, 19 Cal. 2d 807 (1942); Pacific Mutual Life Ins. Co. of Calif. v. McConnell, 44 C.A. 2d 715 (1955).

The question whether the creation of the Hoopa Valley Reservation reserved to the Indians the right to fish in the Klamath River was squarely and unavoidably before the trial court in this case. The trial court could not have dismissed Counts Two and Three of the Information unless the court determined that the fish, which were from the Klamath River, had been caught within the boundaries of the Reservation in the exercise of Respondent's federally-reserved fishing right.

The trial court's judgment necessarily decided the same basic question which Petitioner seeks to raise before this Court in the Petition, and did so adversely to Petitioner. That judgment was not appealed, and became final before this case was considered by the Court of Appeal. Thus, all of the elements necessary for a finding of res judicata are present.

Petitioner has attempted to avoid the bar of res judicata by claiming (Pet., p. 8, n. 6) that the arguments which it chose not to present in the trial court are "jurisdictional," and thus "can clearly be raised at any stage of the proceeding." This contention is patently devoid of merit.

Petitioner is not challenging the California Supreme Court's subject-matter jurisdiction; rather, Petitioner is attacking the merits of the lower court's decision that Petitioner lacks regulatory jurisdiction over Respondent's exercise of his federally-reserved right to fish in the Klamath River.

The cases cited in the Petition do not support the proposition that Petitioner may repuduiate its prior concessions. All of those cases involved concessions or practices outside of judicial proceedings in which the specific right or power was at issue. There is no authority for the proposition that Petitioner is not bound by the

actions of its representatives in judicial proceedings. See, e.g., Elser v. Gill Net No. 1, 246 C.A. 2d 30, 31 (1966).

B. Collateral Estoppel

In several previous court cases initiated by and/or involving Petitioner or its authorized agents, Petitioner contended that the waters of the lower 20 miles of the Klamath River are not within the boundaries of the Hoopa Valley Reservation, that the creation of the Reservation did not create/reserve a federally-protected right to fish in the waters of the Klamath River, and that Petitioner may regulate Indian fishing in the Klamath River. See. e.g., Elser v. Gill Net No. 1 246 C.A. 2d 30 (1966); Donahue v. Justice Court 15 C.A. 3d 557 (1971); Arnett v. 5 Gill Nets, supra; see also, Mattz v. Arnett, supra; Blake v. Arnett 663 F. 2d 906 (9th Cir., 1981). In each of those cases, Petitioner had the opportunity to offer the same evidence and make the same legal arguments which it failed to make in the trial court in this case, and which it now seeks to make in the Petition.

In each of those cases, the court determined that the Indians of the Hoopa Valley Reservation have a federally-reserved right to fish in the Klamath River within the boundaries of the Hoopa Valley Reservation, and that Petitioner has no authority to regulate the exercise of that right.

Under California law, the doctrine of collateral estoppel precludes a party or one in privity with a party to an action from relitigating in a subsequent action any issue determined in the prior action, and every matter which might have been urged to sustain or defeat the prior determination. Pacific Mutual Life Ins. Co. of Calif. v. McConnell (1955) 44 C. 2d 715; Vanguard Recording Society v. Fantasy Records, Inc. (1972) 24 C.A. 3d 410; Bernhard v. Bank of America (1942).

Petitioner or its privies were parties to the prior cases.[1/] The prior cases explicitly or by necessary implication involved and finally determined adversely to Petitioner the question whether the creation of the Hoopa Valley Reservation reserved to the Indians thereof a federally-protected right to fish in the Klamath River.[2/]

Thus, all of the elements of collateral estoppel are present in this case, and Petitioner cannot now relitigate the existence of Respondent's fishing right by claiming that the lower courts improperly failed to consider its untimely and unsupported arguments.

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1 In Elser v. Gill Net No. 1, supra, the Court of Appeal rejected the Attorney General's similar attempt to repudiate trial court representation by the District Attorney.

2 In Mattz v. Arnett, the Court remanded the case for a determination of the fishing rights issue. The right was confirmed in Arnett v. 5 Gill Nets.

C. Waiver

Petitioner has had numerous opportunities to present to a trial court the principal factual and legal contentions which it now seeks to raise in the Petition. As conceded by Petitioner in its "Supplemental Brief," Petitioner consistently has chosen not to present those contentions in the trial court in this case, and as noted above, Petitioner did not appeal from the adverse ruling of the trial court.

Under California law, a party --any party-- who fails to appeal from a judgment may not thereafter advance a legal theory which would render that judgment erroneous. Zalk v. General Exploration Co., 105 C.A. 3d 786 (1980). Neither may a party transform an appellate court into a trial court by offering for the first time on appeal evidence or arguments which could have been presented to the trial court; that has been rightly condemned as, "playing fast and loose with the decisional process." De Angeles v. Roos Bros., Inc., 244 C.A. 2d 434 52 C. Rptr. 783, 790 (1966). See also, Albertson v. Raboff, 46 C. 2d 375 (1956).

The United States Supreme Court adheres to the same principle:

> "But it is the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the Federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below. [Citation omitted.]" McGoldrick v. Compagnie Gen. Transatlantique, 309 U.S. 430, 434 (1939).

See also, Harrison v. Perea, 168 U.S. 311 (1897).

Petitioner seeks to present in its Petition the same basic issue which necessarily and finally was resolved against Petitioner in the unappealed portion of the trial court's judgment in this case and in several prior cases. Res judicata, collateral estoppel and waiver all preclude Petitioner from doing so. Thus, the Petition should be denied.

II. THE "EQUAL FOOTING DOCTRINE" DOES NOT GIVE CALIFORNIA POWER TO REGULATE INDIAN FISHING WITHIN THE BOUNDARIES OF THE HOOPA VALLEY RESERVATION.

Petitioner contends that the navigability of the Klamath River confers upon it jurisdiction to regulate the Indian use of the Klamath's fish resources within the Hoopa Valley Reservation. In so doing, it equates ownership of the riverbed with jurisdiction over a Reservation member's use of this natural resource. This is contrary to the massive body of case law which has recognized that the "equal footing" doctrine does not limit the federal government's authority to protect Indians, federal interests in property and natural resources.

Under Article I, §8, cl. 3 of the Constitution, Congress has plenary power not only over international and interstate commerce, including wildlife, see, e.g., Hughes v. Oklahoma, 441 U.S. 322 (1980), but also over all aspects of Indian affairs. United States v. Kagama, 117 U.S. 375

(1886); United States v. Holliday, 70 U.S. (3 Wall.) 407 (1865). Under Article IV, §3, cl. 2, the United States has similar authority over its property and wildlife, Kleppe v. New Mexico, 426 U.S. 529 (1976), even to the extent of reaching beyond the limits of federal lands, Camfield v. United States, 167 U.S. 518 (1897), and preempting state regulation of hunting and fishing in the navigable waters of a state. Minnesota v. Block, 660 F. 2d 1240 (8th Cir., 1981), cert. den., 455 U.S. 1007; United States v. Brown, 552 F. 2d 817 (8th Cir., 1977), cert. den., 431 U.S. 949.

The only significant constraint on the exercise of federal authority over Indian Affairs is that such exercise must "...be tied rationally to the fulfillment of Congress' unique obligation toward the Indians..." Morton v. Mancari, 417 U.S. 535, 555 (1974). The power of the United States under the Property Clause is similarly expansive; i.e., federal regulations must be "needful" prescriptions "respecting" federal property. United States v. San Francisco, 310 U.S. 16 (1940); United States v. Brown, supra; United States v. Lindsey, 595 F. 2d 5 (9th Cir., 1979).

The determinative question for jurisdictional purposes is not whether the federal reservation or regulation of a resource right occurred before or after statehood, but whether the federal action was necessary or justifiable in the fulfillment of a proper federal objective. If so, the

state's sovereign prerogatives -- even as to navigable waters or wildlife -- are subordinated to the exercise of federal authority under the Constitution's Supremacy Clause, Article VI, cl. 2. See; e.g., U.S. v. North Dakota, 650 F.2d 911 (8th Cir., 1981); affirmed, 458 U.S. 1129 (1983); Menominee Tribe v. United States, 391 U.S. 404 (1968).

As was held in Arizona v. California, 373 U.S. 546, 598 (1963), decree entered, 376 U.S. 340 (1964), modified, 439 U.S. 419 (1979), further modified, ___ U.S. ___, 75 L.Ed 2d 318 (1983),

> "We have no doubt about the power of the United States under these clauses to reserve water rights for its reservations and its property."

Washington v. Fishing Vessels Ass'n., 443 U.S. 658 (1979), construed the federal power described in Arizona v. California, Id., and applied it to Indian fishing rights. See also, Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918); Minnesota v. Block, supra, (Wilderness); United States v. Brown, supra (National Park); United States v. Lindsey, supra, 595 F.2d 5 (National Forest, National Recreation Area, Wild and Scenic River); United States v. Hells Canyon Guide Service, Inc., 660 F.2d 735 (9th Cir., 1981) (National Forest, National Recreation Area, Wild and Scenic River); New England Power Co. v. New Hampshire, 455 U.S. 331 (1982) (hydroelectricity).

Thus, the California Supreme Court followed well-settled principles of federal law when it summarily rejected

Petitioner's arguments about the navigability of the Klamath River, and there is no reason for this Court to consider the issue.

III. THE CIRCUMSTANCES SURROUNDING THE CREATION OF THE RESERVATION INDICATE THAT THE RESERVATION INCLUDES THE KLAMATH RIVER.

There can be no doubt that the primary purpose for which the United States established and enlarged what is now known as the Hoopa Valley Reservation was to protect the Indians from "their deadliest enemies" -- the non-Indian people of the State of California. See, e.g., United States v. Kagama, 118 U.S. 375, 384 (1886). A series of Executive orders authorized by Acts of Congress accomplished this purpose by setting aside a Reservation which would assure the continued availability of the fish and other resources of the Klamath River that were "not much less necessary to the existence of the Indians than the atmosphere that they breathed." Blake v. Arnett, supra, 663 F. 2d at 906.

As the Supreme Court observed in Donnelly v. United States, id., 228 U.S. at 259,

> "Indeed, in view of all of the circumstances, it would be absurd to treat the [Executive] order [establishing the Reservation] as intended to include the uplands to the width of 1 mile on each side of the river, and at the same time to exclude the river. As a matter of history, it plainly appears that the Klamath Indians established themselves along the river in order to gain a subsistence by fishing."3/

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3 Although the Court withdrew the portion of its opinion that had determined that the river was non-navigable, the Court left intact its holding that the river was within the Reservation. 228 U.S. 1035.

See also, Mattz v. Arnett, supra; Arnett v. 5 Gill Nets, supra; Pacific Coast Federation of Fishermens Ass'n. v. Secretary of Commerce, 494 F.Supp. 626, 632-33 (1980).

Without the Klamath River and the reserved right to fish therein, the Hoopa Valley Reservation would have been and now would be just as useless as the Reservation lands along the California side of the Colorado River in Arizona v. California, supra, would have been without a reserved right to the water of that river.

In a succession of decisions, this Court, other federal courts and the courts of the State of California consistently have held that the Klamath River and fishing rights therein were and remain essential to fulfillment of the primary purposes for which the United States created the Hoopa Valley Reservation. This Court need not consider Petitioner's belated claim, unsupported by any evidence in the record, that the Klamath River's purported status as navigable waterway[4/] precluded the reservation of fishing rights in the river for the Indians of the Reservation.

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4 In Donnelly v. United States, supra, the Supreme Court specifically declined to take judicial notice of the purported navigability of the Klamath River. 228 U.S. at 709-710.

Moreover, the very documents from the Justice and Interior Departments upon which Petitioner's present contention is based were expressly considered by the Court in Mattz v. Arnett, 412 U.S. at 491-492, and on remand in Arnett v. 5 Gill Nets, supra. These documents obviously lack the significance Petitoner attaches to them.

IV. CALIFORNIA HAS NEITHER THE RIGHT NOR ANY REASON TO REGULATE AND/OR PROHIBIT OFF-RESERVATION SALES OF FISH BY INDIAN FISHERS.

There are at least three equally compelling reasons why this Court should not review the California Supreme Court's holding that federal law preempts Petitoner's authority to prohibit the off-Reservation sale of fish caught by Indians in Reservation waters.

A. Petitioner Actually Seeks to Regulate On-Reservation Conduct.

Petitioner's only legitimate interest in regulating the exercise ot federally-reserved fishing rights by Indians of the Hoopa Valley Reservation is to conserve the salmon resources of the Klamath River system. Petitioner's only legitimate objective in promoting that interest is to ensure that sufficient fish escape all forms of capture and return to their spawning grounds to reproduce. How, where, by whom and for what purposes fish are caught, and what is done with the fish after capture, are essentially irrelevant to a legitimate conservation interest. Dep't. of Game v. Puyallup Tribe (Puyallup II), 414 U.S. 45 (1973); Washington v. Fishing Vessels Ass'n., supra; Arnett v. 5 Fill Nets, supra; see also, New Mexico v. Mescalero Apache Tribe, ___ U.S. ___, 76 L. Ed 2d 611 (1983).

Precisely because it is the catching of fish, rather than their disposition, that impacts the resource, the

California Supreme Court correctly reasoned that the significant event, in terms of weighing the State's conservation interest, was the on-Reservation catching of the fish, rather than the off-Reservation sale. Accordingly, the Court properly correctly characterized the case as involving on-Reservation conduct, and analyzed the preemption issue accordingly. 36 C. 3d at 536.

Petitioner argues that an Indian who catches fish in Reservation waters may not transport or dispose of those fish beyond Reservation boundaries free of State regulation. That argument is contrary to the unappealed portion of the trial court judgment in this case. It is also contrary to this Court's decision in New Mexico v. Mescalero Apache Tribe, ___ U.S. ___, 76 L.3d 2d 611 (1983), which upheld the right of non-Indians possessing game lawfully caught on a Reservation to transport that game off-Reservation. See also, Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976); and Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980), for analogous treatment of the off-Reservation use of Reservation-based commodities.

B. This case falls within the exceptions to the general rule of Mescalero Apache Tribe v. Jones.

While Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), stated the general rule that Indians going beyond Reservation boundaries are subject to the same laws as

everyone else, there are two crucial qualifications to that rule: 1) Indian immunity to State law is not lost if there is federal law to the contrary; and 2) Indians are subject only to non-discriminatory state laws. Both of these qualifications to the general rule apply in this case, although the California Supreme Court's finding of "federal law to the contrary" made consideration of the second qualification unnecessary.

Mescalero Apache Tribe v. Jones, Id., involved State taxation of the gross receipts of an off-Reservation ski resort that happened to be owned by an Indian Tribe. Although federal policies support Tribal economic development, the resort was not operated pursuant to a reserved Reservation resource right, and was not the subject of a specific and comprehensive regulatory scheme.

This case, on the other hand, involves the exercise of a federally-reserved fishing right that is essential to the fulfillment of the federal purposes for which the Reservation was created, Arnett v. 5 Gill Nets, supra, and is the subject of a specific, comprehensive and detailed federal regulatory scheme. 36 C. 3d at 529-530. The State Supreme Court correctly found that off-Reservation disposition of fish caught on the reservation could not be viewed as separate from the on-Reservation exercise of the right to fish.

The State Supreme Court exhaustively analyzed and compared the respective regulatory schemes of Petitioner and the Secretary. The Court found the federal scheme was so comprehensive as to extend even to the off-Reservation possession or sale of fish, and that the basic premises, objectives and enforcement mechanisms of the State and federal schemes are incompatible. 36 C.3d at 529-531. Thus, the Court correctly found federal preemption under, inter alia, Ramah Navajo School Board v. Bureau of Revenue, 458 U.S. 832 (1982), Warren Trading Post v. Ariz. State Tax Comm'n., 380 U.S. 685 (1965), White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) and New Mexico v. Mescalero Apache Tribe, supra.

Petitioner and amici simply are wrong when they contend that there is no conflict between the federal and State regulatory schemes. The federal scheme is based on the premise that the Indians of the Reservation possess federally-reserved fishing rights, including the right to fish with nets and to sell fish. See, e.g., 42 Fed. Reg. 40904-5 (1977); 43 Fed. Reg. 30048 (1978); 44 Fed. Reg. 17144-51 (1979). Petitioner's laws are based on the premise that no such rights exist. See, e.g., F. & G. Code §§7155, 8434, 8685.5.

The principal intended beneficiaries of the federal scheme are the Indians of the Hoopa Valley Reservation. 25 C.F.R. §250.1(a) (1982). Petitioner's scheme is intended

to benefit primarily the existing non-Indian ocean commercial and the ocean and in-river sport fisheries. See, e.g., F. & G. Code §§7850-52, 7852.5, 8230-39, 8434.

The federal scheme is intended to temporarily regulate Indian fishing only until the Secretary deems a Tribal governing body capable of regulating Indian fishing and conserving the resource. 25 C.F.R. §250.1(a). One objective of the scheme is to encourage and assist the development of Tribal governmental institutions.

By contrast, Petitioner's scheme is permanent and absolute. Petitioner's scheme not only provides no role for Tribal government, but actually discourages development of Tribal institutions. 36 C. 3d at 531.

Finally, the federal scheme provides for penalties commensurate with the minimal impact which the Secretary has found the Indian Fishery has on the resource. Petitioner's scheme treats Indian fishers such as Respondent as felons. At the same time those non-Indian fishers who violate regulations much less intrusive than the absolute ban imposed on Indian commercial fishermen are subject to only minor misdemeanor sanctions. Id.; 25 C.F.R. §250.15(a); F. & G. Code §§12000-12020.

Thus, the California Supreme Court correctly concluded that the Secretary's regulations constitute an "express

federal law to the contrary" within the meaning of Mescalero Apache Tribe v. Jones.

Because the California Supreme Court held that federal law precludes State regulation of Respondent's conduct, it did not address the second qualification to the general rule established by Mescalero Apache Tribe v. Jones, supra; i.e., that the State regulations must be non-discriminatory. In a fishing rights context, State regulation not only must be necessary for conservation of the species, but also must fairly apportion the conservation burden. See, e.g., Washington v. Fishing Vessels Ass'n., supra; Department of Game v. Puyallup Tribe (Puyallup II), supra; Sohappy v. Smith, 529 F.2d 570 (9th Cir., 1976); United States v. Michigan, 653 F.2d 277 (6th Cir., 1981).

If the California Supreme Court had addressed the discrimination/conservation issue, there are two reasons why it could not have concluded that F. & G. Code §8685.6 is non-discriminatory and necessary to conserve the Chinook salmon of the Klamath River system.

First, and most obvious, Petitioner did not even allege or offer to prove in the trial court that the State laws at issue herein are necessary conservation measures. Thus, as in Arnett v. 5 Gill Nets, supra, the record in this case is completely devoid of any evidence upon which such a finding could have been made.

Second, it is obvious from an examination of Petitioner's salmon fishing laws that the total and permanent ban on sales by Reservation Indians of fish caught in Reservation waters is nothing more than a system by which Petitioner has allocated the entire harvestable (and more) portion of Chinook salmon runs in the Klamath River system to the non-Indian ocean commercial and sport fisheries.

There is no provision in Petitioner's scheme for scientific reevaluation of the ban. F. & G. Code §§8434, 8685.6. Moreover, Petitioner has steadfastly resisted efforts to reduce the offshore troll harvest to protect in-river salmon runs. See, e.g., California Senate Joint Resolution No. 35, Res. Chap. 46, June 1, 1982. A copy of that Resolution is included at pp. A17-19 of the Appendix hereto.

Rather than being "... a 'last ditch' attempt at conservation after nondiscriminatory alternatives have proved unfeasible[,]" Hughes v. Oklahoma, supra, 441 U.S. at 338, Petitioner's salmon regulations are "a choice of the most discriminatory means even though non-discriminatory alternatives would seem likely to fulfill the State's legitimate local purpose more effectively." Id. A regulatory scheme virtually indistinguishable from Petitioner's was found to discriminate against Indians in Department of Game v. Puyallup Tribe, (Puyallup II), supra.

Thus, because there is federal law to the contrary, and because Petitioner's salmon regulations are not necessary for conservation and discriminate against the Indians of the Hoopa Valley Reservation, there is no reason to review the California Supreme Court's holding that Respondent did not lose his immunity to State prosecution when he possessed or sold Reservation-caught salmon beyond Reservation boundaries.

V. P.L.83-280 DOES NOT AUTHORIZE CALIFORNIA TO PROHIBIT INDIANS OF THE HOOPA VALLEY RESERVATION FROM SELLING FISH CAUGHT IN RESERVATION WATERS.

The California Supreme Court rejected Petitioner's contention that P.L. 83-280 (18 U.S.C. §1162, 28 U.S.C. §1360) provides California with jurisdiction to regulate fishing by Indians of the Hoopa Valley Reservation. This same argument was made and rejected in Arnett v. 5 Gill Nets, supra. Petitioner has unsuccessfully made essentially the same argument in several other cases. See., e.g., Santa Rosa Band of Indians v. Kings County, 532, F.2d 655 (9th Cir., (1975), cert. den. 429 U.S. 1038; United States v. Humboldt County, 615 F.2d, 1260 (9th Cir., 1980); Cory v. Campbell, 125 C.A. 3d 1044 (1982), cert. den. 459 U.S. 828.

In Bryan v. Itasca County, 426 U.S. 373 (1976); Barona Group of the Capitan Grande Band of Mission Indians v. Duffy, 694 F.2d 1185 (9th Cir., (1982), cert. stat. ___ U.S. ___ 103 S. Ct 2091; United States v. Marcyes, 557 F.2d 1361 (9th Cir., 1977), United States v. Farris, 624 F.2d 890 (9th

Cir., 1980), cert. den., 449 U.S. 1111; and Seminole Tribe of Florida v. Butterworth, 658 F.2d 310 (11th Cir., 1981), cert. den., 455 U.S. 1020), the courts of the United States have consistently rejected the same contention about State jurisdiction under P.L. 83-280 that Petitioner made in this case. There is no reason why this Court should review yet another rejection of this same argument.

CONCLUSION

The California Supreme Court's decision that the Secretary's regulations preempt Petitioner from prosecuting Respondent in this case is entirely consistent with the prior decisions of this Court, other federal courts and even California's own courts in cases involving federal Indian policies and the nature and extent of reserved fishing rights of Reservation Indians. Moreover, the decision is based upon and supported by the evidence, and is properly limited to the issues actually before the court.

The Petition pervasively and deliberately misstates or mischaracterizes the proceedings below, and relies almost entirely upon purported evidence -- including affidavits never offered or introduced in the trial court and expressly rejected by the Court of Appeal -- which never was and cannot now be made part of the record.

By such means, in reliance upon legal arguments precluded by doctrines of res judicata, collateral estoppel and waiver, and upon grounds repeatedly rejected by this Court and other federal and State courts, Petitioner seeks nothing less than to extinguish the federal right of the Indians of the Hoopa Valley Reservation to fish in the Klamath River, a right which is "not much less necessary to the existence of the Indians than the atmosphere they breathed." Blake v. Arnett, supra, 663 F.2d at 909.

There is no reason in law, fact, logic or justice to deprive the Indians of the Hoopa Valley Reservation of that essential right, and thus the Petition should be denied.

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No. 84-453

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

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Petitioner,

vs.

WALTER McCOVEY, JR., and LANCE R. WILKIE,
Respondents.

On Writ of Certiorari to the California Supreme Court

AMICI CURIAE BRIEF OF STATES OF ALASKA, ARIZONA, IDAHO, MONTANA, NEVADA, OREGON, NORTH DAKOTA, AND SOUTH DAKOTA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The *amici* brief is limited to the following questions:

1. Whether, and to what extent, the states have the right to regulate off-reservation Indian activity.

2. Whether the states have regulatory jurisdiction over navigable waters flowing across Indian country, where the state acquired title to the waters upon admission to statehood and where an Indian reservation was created on adjacent lands after the state's admission to statehood.

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INTEREST OF AMICI CURIAE

Although this case arises from a State court decision that lacks binding effect outside the State, the western states named herein as *amici curiae* have a substantial interest in the issues presented in the case. The *amici* states have large quantities of navigable waters located within their borders,[1] and substantial portions of their lands have been set aside by the federal government as reservations

[1]The western states contain several thousands of miles of navigable waterways. For example, the Columbia, Snake, Willamette, Sacramento, Klamath, Colorado and Yellowstone Rivers, all of which are navigable, have a total volume of more than 250 million acre-feet of water annually. See State of California, *California Water Atlas*, at 3 (1979).

for Indian purposes. The *amici* states therefore have an interest in questions concerning the relationship of the states to their Indian citizens, and in questions concerning the scope of state jurisdiction in navigable waters. Where, as in this case, both questions are presented in the same case, the interest of the *amici* states is especially profound.

The *amici* states' interest particularly applies to two issues arising out of the California Supreme Court decision, and the *amici* brief will be limited to these two issues. First, the California Supreme Court decision holds that federal regulations preempt California laws as applied to off-reservation Indian conduct, even though there is no clear conflict between the federal regulations and California law. By its willingness to construe the federal regulations as having a preemptive effect, even in the absence of a conflict between federal and state policies, the lower court departed from this Court's decisions holding that state laws are applicable to off-reservation Indian conduct unless such state laws are "expressly" contrary to federal law. See, *e.g.*, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149 (1973). The lower decision thus poses a disturbing threat to the traditional state-tribal relationship with respect to off-reservation Indian conduct.

Second, the California Supreme Court decision, in holding that California cannot prohibit Indian commercial fishing in the Klamath River, is logically supportable only by the conclusion that the states lack full sovereign control of their navigable waters. This Court has consistently held, however, that the Equal Footing Doctrine vests the western states with full jurisdiction over their navigable waters, including fisheries therein, subject only to federal navigation powers and federal "reserved" water rights. See, *e.g.*,

United States v. Rio Grande Dam & Irrig. Co., 174 U.S. 690, 703 (1890). Neither limitation applies here. Therefore, the California Supreme Court decision lacks a constitutional or jurisdictional basis. The decision, if allowed to stand, poses a distinct threat to the western states' sovereign interests in navigable waterways.

For the above reasons, the *amici* states believe that this case presents truly historic issues concerning state jurisdiction over navigable waters and over off-reservation Indian conduct, and therefore should be reviewed by this Court.

REASONS FOR GRANTING THE WRIT

A. The States Have the Right to Regulate Off-Reservation Activity of their Indian Citizens

This Court has consistently held that, notwithstanding any limitations on state jurisdiction over on-reservation activities of their Indian citizens, a state may fully apply its nondiscriminatory laws to their off-reservation activities unless such application is contrary to "express" federal law. See *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149 (1973); *New Mexico v. Mescalero Apache Tribe*, ... U.S. ....., 103 S.Ct. 2378, 2387 n. 18 (1983); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 n. 11 (1980); *Ward v. Race Horse*, 163 U.S. 504 (1896). "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the state." *Mescalero Apache Tribe v. Jones, supra*, 411 U.S. at 148-149. Thus, although Indians are largely free of state laws when on the reservation, particularly where state

law conflicts with federal policy or tribal self-government, Indians are subject to the full panoply of state laws when they leave the tribal homeland and become part of non-Indian society. This rule accommodates the various tribal, state and federal interests by distinguishing between on- and off-reservation Indian activity.

In the present case, the proscribed activity, as well as the accompanying arrests, took place hundreds of miles from the reservation. The fish sales violated not only California law, but also regulations adopted by the Secretary of the Interior prohibiting Indian commercial fishing. Thus, California law is not in conflict with any relevant federal regulation, policy, or interest. Moreover, any relevant tribal interest could have been satisfied by fish sales on the reservation, assuming that the respondents have the right to commercially fish. Therefore, no federal or tribal policy stands in the way of California's regulatory efforts here. There is simply no basis for departing from the customary rule that state law applies to off-reservation Indian activity.

The California Supreme Court decision departs from this well-recognized rule by holding that the Secretary of the Interior's regulations preempt California law even as applied to off-reservation sales. As noted above, the Secretary's regulations do not conflict with California law, because both prohibit Indian commercial fishing in all forms. Moreover, the record shows that the Secretary has instructed federal agencies to assist and cooperate with State officials who prosecute Klamath River Indians for violations of State law. Pet. App. 64. In the face of the record, the California Supreme Court too easily presumed not only that Indian fishing rights necessary encompass commer-

cial rights,[2] but also that the Secretary's regulations oust California from its usual and customary jurisdiction over off-reservation Indian conduct. Even under ordinary preemption analysis, federal law preempts state law only where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 141 (1963), quoting from *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941).[3] Here, California law poses no "obstacle" to congressional objectives because it effectuates the same policy as the Secretary's regulations, which is to prohibit Indian commercial fishing.

Additionally, it is doubtful that the Secretary should be deemed to have authority to preempt state laws as applied to off-reservation Indian activity unless Congress clearly delegates such authority to him, or unless the federal or

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[2]Even assuming that Indians may have the right to fish for subsistence purposes under federal law, this right does not necessarily include the right to fish for commercial purposes, particularly where the Indian tribe lacks a tradition of commercially fishing. The California Supreme Court decision, although holding that "the creation of a reservation for Indian purposes encompasses the right to fish on the reservation," Pet. App. 21 n. 22, is devoid of any analysis whether the Indian tribe in question traditionally fished for commercial purposes.

[3]Because of the tradition of tribal sovereignty, the usual preemption analysis does not apply in determining the applicability of state laws to *on*-reservation Indian conduct. See, *e.g., White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 143 (1980). On the other hand, state laws apply to *off*-reservation Indian conduct unless contrary to "express" federal law. See, *e.g., Mescalero Apache Tribe v. Jones, supra,* 411 U.S. at 148-149. Thus, where off-reservation activity is involved, state laws presumptively apply to Indian conduct without the usual preemption analysis, and would therefore apply, *a fortiori,* where the state law does not pose an "obstacle" to congressional objectives.

tribal interest cannot be otherwise served. The dynamics of the federal, state and tribal relationship, which weigh in favor of preemption of state laws as applied to on-reservation conduct, clearly change when the Indians leave the reservation. In this situation, the state has a compelling interest in uniform application of its laws to all citizens within its borders. Concomitantly, the tribal interest is diminished, since any relevant tribal interest can be pursued on the reservation. Here, for example, there is no indication that the respondents could not have sold fish on the reservation, which is intersected by a major north-south highway running through California. Although the respondents' profits are doubtlessly maximized by off-reservation sales, there is no indication that they could not have made a reasonable profit selling fish on the reservation. Under these circumstances, California's interests would seem to clearly outweigh any competing federal or tribal interests, even assuming, contrary to the record, that these interests are in competition. The California Supreme Court decision, in going in the opposite direction, signifies a truly unprecedented departure from settled principles of federal Indian law established by this Court.

B. The States Have the Sovereign Power Under the Equal Footing Doctrine to Regulate Navigable Waters, and This Sovereign Power Cannot be Encumbered by the Subsequent Creation of Indian Reservations

In its petition, California asserts that, under the Equal Footing Doctrine, it acquired sovereign jurisdiction over the Klamath River, a navigable waterway, upon California's admission to statehood. Pet. 12-15. California also asserts that the presidential executive order creating the

reservation, by recognizing California's sovereign interests, purposefully did not include the river in the reservation. Pet. 15-17. If either argument is correct, California would have the right to regulate the commercial *taking* of fish in the river, not just sales of fish elsewhere in the State. Under these circumstances, both the taking and the sales would have occurred off the reservation. And, therefore, the Secretary of the Interior would lack authority to preempt California laws prohibiting the commercial taking of fish, even assuming that he meant to do so. California's arguments are relevant and significant, for, assuming their correctness, the California Supreme Court decision lacks a constitutional basis in concluding that California cannot regulate Indian commercial fishing here.

Turning to the merits, the Equal Footing Doctrine provides that California and other western states acquired sovereign right, title and interest in their navigable waters and underlying beds upon admission to statehood. See, *e.g.*, *Martin v. Waddell,* 41 U.S. (16 Pet.) 367, 410 (1842); *Pollard's Lessee v. Hagan,* 44 U.S. (3 How.) 212, 229 (1845); *Shively v. Bowlby,* 152 U.S. 1, 11-18, 49-50 (1894); *United States v. Texas,* 339 U.S. 707, 716-718 (1950); *Manchester v. Massachusetts,* 139 U.S. 240, 259-262 (1891). In *United States v. Texas, supra,* this Court stated:

> "[U]pon the admission of a State to the Union, the title of the United States to lands underlying navigable waters within the States passes to it, as incident to the transfer to the State of local sovereignty, and is subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce." 339 U.S. 707, 717 (1950), quoting from *United States v. Oregon,* 295 U.S. 1, 14 (1935).

More recently, this Court declared:

> "[U]nder *Pollard's Lessee* the State's title to lands underlying navigable waters within its boundaries is conferred not by Congress but by the Constitution itself. The rule laid down in *Pollard's Lessee* has been followed in an unbroken line of cases which make it clear that the title thus acquired by the State is absolute so far as any federal principle of land titles is concerned." *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977).

As California points out in its petition, the U.S. Attorney General issued an opinion in 1891 supporting the view that California now asserts before this Court. Pet. 14, & Pet. App. 58-59. The opinion, indeed, arose in the context of the very Indian reservation in this case. The opinion notes that, although the federal government retained power to regulate navigation, California acquired sovereign control of the waters of the Klamath River upon its admission to statehood in 1850. *Id.* The opinion concludes that the fisheries in the river "remain under the exclusive control of the State," and that the reservation cannot lawfully include the river itself. *Id.* The President apparently acted in reliance on the Attorney General opinion in issuing the executive order creating the Indian reservation in this case. Pet. 17.

State sovereign interests acquired under the Equal Footing Doctrine extend to fisheries in navigable waters. See *McCready v. Virginia*, 94 U.S. 391, 394-395 (1876); *Manchester v. Massachusetts*, 139 U.S. 240, 259 (1891); *Shively v. Bowlby*, supra, 151 U.S. at 11. In *McCready*, this Court stated:

> "The principle has long been settled in this court, that each State owns the beds of all tide-waters within its

> jurisdiction, unless they have been granted away. [Citations omitted.] In like manner, *the States own* the tide-waters themselves, and *the fish in them,* so far as they are capable of ownership while running. For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty. [Citation omitted.] The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and inter-state commerce, has been granted to the United States. *There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the State,* which has consequently the right, in its discretion, to appropriate its tide-waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation." 94 U.S. at 394 (emphasis added).

Therefore, state interests in navigable waters include title to and regulatory authority over fisheries, subject only to the federal power to regulate navigation. In fact, the U. S. Attorney General relied on the above-quoted language from *McCready* in concluding in 1891 that California acquired sovereign control of the Klamath River fishery here. See Pet. 15.

The states' sovereign powers under the Equal Footing Doctrine are not, however, without limitation. Beyond the fact that the states may not impair the federal power to regulate navigation, state interests in navigable waters are subject to proprietary rights conveyed by the federal government during the pre-statehood period. See *Montana v. United States,* 450 U.S. 544, 551-552 (1981); *United States v. Holt State Bank,* 270 U.S. 49, 54-55 (1926); *Chocktaw Nation v. Oklahoma,* 397 U.S. 620 (1970). Therefore, Indian

fishing rights granted by pre-statehood treaties cannot be abridged by state law. See *United States v. Winans,* 198 U.S. 371 (1905). Still, there is a strong presumption against pre-statehood conveyances that limit the states' sovereign interests in navigable waters. This Court has stated:

> "Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either grants by the sovereign of the lands to be held in private ownership or transfer of sovereignty itself." *United States v. Texas, supra,* 339 U.S. at 717, quoting from *United States v. Oregon, supra,* 295 U.S. at 14. See also *Montana v. United States, supra,* 450 U.S. at 552.

The pre-statehood conveyance limitation does not appear to apply in this case. The Indian reservation here was created well after California was admitted to statehood in 1850. The federal power to convey proprietary interests in navigable waters expires upon the state's admission to statehood. See *Shively v. Bowlby, supra,* 152 U.S. at 29-50 (the federal power exists "during the period of territorial government"); *United States v. Holt State Bank, supra,* 270 U.S. at 54 (the United States can convey interests to Indian tribes "after acquiring the territory and before the creation of the state"); *United States v. Winans, supra,* 198 U.S. at 383 (the federal government can convey Indian fishing rights "so long as [the Territories] . . . remain in territorial condition"). Therefore, the federal government did not have the power to grant commercial fishing rights here at the time of the reservation's creation, even assuming that it meant to do so.

Another limitation on state sovereign interests in navigable waters is found in the reserved rights doctrine, under which the federal government possesses water rights to satisfy the purposes of reserved federal lands. See, *e.g.*, *Cappaert v. United States,* 426 U.S. 128 (1976); *United States v. New Mexico,* 438 U.S. 696 (1978). The reserved rights doctrine does not apply in this case, because the dispute is over fishery regulation rather than water rights. Further, it would be improper to extend the reserved rights doctrine to include fishery regulation. Otherwise, the federal government would be able to indirectly claim "reserved" rights over resources which cannot be directly "conveyed" during the post-statehood period, which would emasculate this Court's decisions holding that the federal government cannot "convey" proprietary rights during the post-statehood period. See, *e.g., Montana v. United States,* 450 U.S. at 552. Under this result, the federal government would be able to assert claims over resources in navigable waters that have been long recognized as belonging to the states. The logic of the reserved rights doctrine does not permit its extension here.

Although the California Supreme Court decision does not specifically consider the Equal Footing Doctrine issue, California properly raised the issue below and thus the issue is properly before this Court. More importantly, the lower decision, by holding that California cannot regulate the taking or selling of fish, simply lacks a constitutional basis. For, since California acquired sovereign control of the Klamath River fishery upon its admission to statehood, the Secretary of the Interior cannot lawfully adopt regulations preempting California laws, even assuming that he meant to do so. Therefore, the lower decision can be sustained only

by rejection of California's constitutional arguments. Clearly a state court cannot deprive this Court of its power to review significant constitutional questions by the simple expedient of refraining from deciding such questions, particularly where the lower decision can only be sustained by the conclusion that the state lacks constitutional power to do what it attempts to do.

CONCLUSION

The California Supreme Court decision here significantly changes several basic Indian law principles long settled by this Court. The decision enlarges and extends the immunity of Indians from state laws even when they leave the tribal reservation and enter the mainstream of non-Indian society. The decision, on the other hand, narrows and limits the states' sovereign control of their navigable waters under the Equal Footing Doctrine. Many significant issues are presented in this case, involving the relationship of federal and state power over navigable waters and involving state powers over off-reservation Indian activity. This case affords a unique opportunity for this Court to review these questions in relation to each other rather than in isolation. The Court should grant the petition for writ of certiorari.

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SUPPLEMENTAL BRIEF (RULE 22)

After the petition for writ of certiorari was filed, respondent counsel wrote a letter to the petitioner, asserting that the petition improperly fails to mention that the local district attorney "conceded" at the trial level that the respondent has the right to fish in the Klamath River free of State regulation. The petition did not mention the matter because, as will be explained below, the matter was not mentioned in the decision under review and, in our view, is not material here in any event. Therefore, we do not believe that the matter is properly includible in the petition under Rule 21.1(g). Since respondent counsel's letter indicates that he believes otherwise, the People wish to bring the matter to the Court's attention to ensure that the petition fully presents this issue even though we do not believe it material.

At trial, the respondent moved to dismiss the criminal charges, which were based on California Penal Code sections 8685.6 and 182 and Fish and Game Code section 2002. The local district attorney opposed the dismissal motion, successfully, by arguing that the respondent lacks the right to sell fish *off* the reservation. In opposing the motion, the district attorney added a comment not material to his argument, thusly:

> "Counsel in their memorandum of points and authorities argue strenuously that the fish herein were caught on the Hoopa Valley Indian Reservation—and the People agree. *Mattz v. Arnett* (1973) 412 U.S. 481 clearly states that the Hoopa Valley Indian Reservation begins at the Pacific Ocean and continues along the Klamath River until the confluence of the Klamath and Trinity Rivers.
>
> "The defendants next argue that they have a federally protected right to fish by gill nets from the Klamath River and sell the same to sustain themselves. The People similarly agree that the defendants' right to fish in this manner in the reservation is controlled

federally and California law may not infringe thereon." CT 103:1-11.

The trial court, although dismissing the charges based on Penal Code section 182 and Fish and Game Code section 2002, denied the dismissal motion as based on Fish and Game Code section 8685.6, and the respondent was subsequently convicted for violating the latter provision. In its order denying dismissal, the trial court, relying on the district attorney statement, stated:

> "It is equally clear, however, that Yurok Indians have the right under federal law, to catch fish in this manner on their reservation, and the prosecution does not contend to the contrary. (*Mattz v. Arnett* (1973) 412 U.S. 481; *Arnett v. Five Gill Nets* (1975), 48 Cal.App.3d 454)." CT 142:13-17.

The district attorney made his gratuitous comment in the context of arguing, successfully, that the respondent cannot sell fish under the circumstances of this case. The district attorney obviously attached little significance to the question whether the respondent has the right to fish in the river, since this question was immaterial to his argument. Moreover, the district attorney's comment was incorrect as a matter of law, since he cited as authority this Court's decision in *Mattz v. Arnett,* 412 U.S. 481 (1973). In *Mattz,* this Court held only that an 1892 congressional act did not terminate the reservation, and the Court did not determine or even consider whether the reservation includes the river. Therefore, the district attorney comment was both immaterial to his successful argument and legally incorrect in any event.

Further, as the record before this Court fully discloses, the California Supreme Court decision under review, as well as the Court of Appeal decision preceding it, made no reference whatsoever to the district attorney's statement. Pet. App. 1-39. Thus, the statement was immaterial to the result and reasoning of the decision under review. Also, as

the petition indicates, the People fully raised before both the California Supreme Court and the Court of Appeal the question whether the respondent has the right to fish in the river. Pet. 6-7, & 7 n. 5.

Finally, and most importantly, both this Court and the California courts have consistently held that sovereign interests in navigable waters cannot be lost even by long-standing official conduct or interpretation that fails to recognize such interests. See *United States v. California,* 332 U.S. 19, 39-40 (1947); *California ex rel. State Lands Comm'n v. United States,* 457 U.S. 273, 276 n. 4 (1982); *County of Los Angeles v. Berk,* 26 Cal.3d 201, 222 (1980). *A fortiori,* California's sovereign interests in navigable waters cannot be lost by an unauthorized, out-of-context statement made by its representative in the trial proceeding.

For the above reasons, the People believe that the above-described facts are not material, and thus are not properly includible in the petition under Rule 21.1(g). Since respondent counsel's letter to us indicates a contrary view, we bring the matter to the Court's attention to ensure that the petition fully presents this issue.

Respectfully submitted,

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No. 84-453

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1984

PEOPLE OF THE STATE OF CALIFORNIA
Petitioner,

vs.

WALTER McCOVEY, JR., and LANCE R. WILKIE,
Respondents.

On Writ of Certiorari to the California Supreme Court

PETITIONER'S REPLY BRIEF (RULE 22.5)

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I

THE EQUAL FOOTING DOCTRINE ISSUE RAISES SIGNIFICANT, UNRESOLVED FEDERAL QUESTIONS.

The respondent, in arguing that the Equal Footing Doctrine does not apply here, cites several decisions of this Court for the proposition that Congress has "plenary power" over wildlife and over Indian affairs. Res. Br. 20-21. Therefore, it is argued, it is relevant only whether the federal action is "necessary or justifiable in the fulfillment of a federal objective," not whether the reservation was created before or after statehood. Res. Br. 20.

This Court's decisions cited by respondent did not affect or involve state sovereign interests in navigable waters acquired under the Equal Footing Doctrine. See, *e.g.*, *Hughes v. Oklahoma,* 441 U.S. 322 (1980) (state control of wildlife subject to Commerce Clause); *Kleppe v. New Mexico,* 426 U.S. 529 (1976) (Congress has constitutional power to control wildlife on federal lands); *Camfield v. United States,* 167 U.S. 518 (1897) (United States has rights of ordinary proprietor in federal lands). Thus, the decisions do not suggest any limitation on state sovereign interests under the Equal Footing Doctrine.

Moreover, the respondent makes no reference whatsoever to this Court's decisions in *Montana v. United States,* 450 U.S. 544 (1981), and *United States v. Holt State Bank,* 270 U.S. 49 (1926), in which this Court held that the Equal Footing Doctrine limits the power of Congress to infringe on state sovereign interests in navigable waters. *Montana* and *Holt State Bank* squarely hold that Congress can grant "proprietary" interests in navigable waters during the pre-statehood period, but not during the post-statehood period. Pet. 12-13. Since this analysis was followed in *United States v. Winans,* 198 U.S. 371 (1905), where this Court held that the State of Washington cannot abridge

Indian fishing rights granted by treaty during the *pre*-statehood period, the clear implication is that Congress—much less the Secretary of the Interior—cannot grant Indian fishing rights during the *post*-statehood period. At most, the respondent's argument shows that this Court's decisions holding that Congress has "plenary" power over wildlife and over Indian affairs are in conflict with this Court's decisions holding that Congress cannot grant "proprietary" rights during the post-statehood period, and this Court should grant the petition to resolve the conflict.[1]

II

THE RESPONDENT HAS FAILED TO RESPOND TO THE PEOPLE'S ARGUMENT CONCERNING THE "SURROUNDING CIRCUMSTANCES" OF THE RESERVATION CREATION.

The petition notes that the U. S. Attorney General opined in 1891 that the federal government lacked the right to interfere with California's sovereign interests in the Klamath River, and that the executive order creating the reservation, following the Attorney General opinion, specifically limited the reservation to "a tract of country one mile in width *on each side* of the Klamath River." Pet. 1, 16-17 (emphasis added). The respondent makes no reference to the Attorney General opinion, or the extent to

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[1]The respondent also argues that the reserved water rights doctrine, under which the federal government has the right to use water on reserved federal lands, limits California's sovereign rights in the Klamath River. Res. Br. 21. As explained in the petition, the reserved rights doctrine is limited to federal water rights, which are not in question here. Pet. 13 n. 10. Further, it would be inappropriate to extend the doctrine to this case, because the federal government otherwise would be able to claim a proprietary interest in resources which are an incident of navigable waters, a result that this Court has rejected in other contexts. See Amici Curiae Brief of States of Alaska, *et al.*, in Support of Petition for Writ of Certiorari, 11.

which it influenced the executive order. The respondent thus has failed to respond to the People's argument.[2]

III

THIS CASE PRESENTS SIGNIFICANT QUESTIONS CONCERNING THE STATE'S RIGHT TO REGULATE OFF-RESERVATION INDIAN CONDUCT.

The respondent argues that California's only legitimate interest here is to conserve the fishery resource, and that this interest is not affected by off-reservation sales of fish.

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[2]The respondent cites this Court's statement in *Donnelly v. United States*, 228 U.S. 243, 259 (1913), that it would be "absurd" to treat the executive order as excluding the river from the reservation. Res. Br. 22. This statement is inconsistent with the U.S. Attorney General's 1891 opinion declaring that the executive order, "if it had so declared, would have been ineffective to include the bed and waters of that river as part of the Indian reservation." Pet. 14. Moreover, the *Donnelly* Court, on rehearing, vacated its ruling that the Klamath River was not navigable, which was the basis of the Court's comment that it was "absurd" to exclude the river from the reservation. 228 U.S. at 711-712.

The respondent also asserts that "the very documents from the Justice and Interior Departments upon which Petitioner's present contention is based were expressly considered" in *Mattz v. Arnett*, 412 U.S. 481, 491-492 (1973), and *Arnett v. Five Gill Nets*, 48 Cal.App.3d 454 (1974). Res. Br. 23 n. 4. The U. S. Attorney General opinion was cited in *Mattz* only for the proposition that the Attorney General was "unable to discover from the records or correspondence of this office that any proceedings were ever had or contemplated by this Department for the survey and sale of said reservation . . . ." 412 U.S. at 491 n. 12, and no reference was made in *Mattz* to the part of the Attorney General opinion declaring that the reservation cannot lawfully include the river.

The respondent's statement that the Attorney General opinion was "expressly considered" in *Five Gill Nets* is incorrect, since the opinion was not mentioned in the decision. Also, the respondent's statement that the Interior memorandum was "expressly considered" in both *Mattz* and *Five Gill Nets* is also incorrect, since the memorandum was issued subsequently to both decisions. See Pet. App. 62.

Res. Br. 24-25. To the contrary, California, as a sovereign, has an obvious interest in uniform application of its laws to all citizens, Indians and non-Indians alike, in non-reservation areas. This sovereign interest underlies the long-established rule that state laws apply to off-reservation Indian conduct in the absence of "express" federal law to the contrary. See, *e.g.*, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149 (1973); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 n. 11 (1980).

In effect, the respondent argues, as the California Supreme Court held, that the balancing test—which applies in determining the applicability of state laws *on* Indian reservations—also applies in determining the applicability of state laws *off* the reservation. Pet. 18-19. Under this approach, no distinction exists between on- and off-reservation Indian conduct, because the same balancing test applies in both contexts. This Court, however, has upheld such a distinction, holding that the balancing test applies to on-reservation conduct but that state laws are applicable to off-reservation conduct unless Congress "expressly" directs otherwise. Compare, *e.g.*, *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 167-168, 170-173 (1973) (on-reservation conduct), with *Mescalero Apache Tribe v. Jones*, *supra*, 411 U.S. at 148-149 (off-reservation conduct).

The respondent also argues that California law is preempted because it conflicts with the Secretary of the Interior's regulations. Res. Br. 27-29. As explained in the petition, no such conflict exists, because both California law and the Secretary's regulations prohibit Indian commercial fishing. Pet. 19. Moreover, even assuming *arguendo* that the Secretary's regulations are intended to occupy the field, it is possible to reconcile the Secretary's regulations with California law without concluding that the regulations have a preemptive effect. That is, the Secretary's regulations at most regulate on-reservation conduct—and thus would permit on-reservation sales assuming that the regu-

lations are amended to authorize such sales—but do not grant immunity from State law to Indians who leave the reservation. This result accommodates any relevant federal or tribal interest, because it allows Indians to sell on the reservation free of State law. This result also accommodates the California policy of uniform application of law in all off-reservation areas. Indeed, this result is apparently contemplated in the directive issued by the Solicitor of the Department of the Interior, instructing federal agents to fully assist and cooperate with State law enforcement officials who prosecute Klamath River Indian commercial fishermen for violation of State laws. See Pet. 19, & App. 64.[3] Thus, federal, tribal and State interests can be accommodated without the conclusion that California law is preempted here.

The respondent also argues that Indian commercial fishing rights are "essential to the fulfillment" of the purposes for which the reservation was created. Res. Br. 36. To the contrary, nothing in the "surrounding circumstances" relating to the reservation creation suggests that Indian commercial rights—as opposed to subsistence rights—were contemplated by Congress or the Secretary of the Interior, and the respondent notably has cited no authority to the contrary. Assuming *arguendo* that the respondent has the right to fish for subsistence under federal law, it does not follow that he has the right to fish commercially.[4]

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[3]Since the respondent states that "the copy [of the Solicitor memorandum] included in the Appendix is not accurate," Res. Br. 11, the People are lodging a copy of the memorandum with the Clerk for this Court's perusal.

[4]This case presents no question concerning the Indians' right to fish for subsistence, since California does not restrict Indian subsistence fishing in the Klamath River.

IV

THE STATE CANNOT BE ESTOPPED FROM ASSERTING ITS SOVEREIGN INTERESTS IN NAVIGABLE WATERS.

The respondent argues that the People are barred by res judicata, collateral estoppel, and waiver from asserting California's sovereign interests in navigable waters. Res. Br. 13-19. As the People's Supplemental Brief makes clear, both this Court and the California courts have squarely held that sovereign interests in navigable waters cannot be lost by estoppel, waiver, or laches. See, *e.g., United States v. California,* 332 U.S. 19, 39-40 (1947); *California ex rel. State Lands Comm'n v. United States,* 457 U.S. 273, 276 n. 4 (1982); *State of California v. Superior Court (Fogerty),* 29 Cal.3d 240, 244 (1981); *County of Los Angeles v. Berk,* 26 Cal.3d 201, 222 (1980). In *United States v. California, supra,* this Court stated:

> "[E]ven assuming that Government agencies have been negligent in failing to recognize or assert the claims of the Government at an earlier date, the great interests of the Government in this ocean area are not to be forfeited as a result. The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches or failure to act." 332 U.S. at 39-40.[5]

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[5]In a similar vein, the California Supreme Court in *Fogerty* stated:

> "Estoppel will not be applied to the government if the result would be to nullify a strong rule of policy adopted for the benefit of the public." 29 Cal.3d at 244.

Moreover, as the Supplemental Brief makes clear, the district attorney "concession" cited by the respondent was immaterial in its actual context, and was incorrect as a matter of law in any event. Supp. Br. 2. Also, the respondent acknowledges that the People fully asserted the State's sovereign interests in the river before both the California Supreme Court and the Court of Appeal. Res. Br. 8; see Pet. 6. Finally, the scope of California's sovereign interests in the river is immaterial to the question whether California has the right to prevent off-reservation sales, and this question presents an independent basis for this Court to review the case. See Pet. i.

The respondent also argues that res judicata applies because the trial court dismissed the charges based on Fish and Game Code section 2002 and Penal Code section 182, and the People failed to appeal the dismissal. Res. Br. 13-16. This argument appears to be based on law of the case, not res judicata. In any event, the first provision—section 2002—is a lesser included offense in this case,[6] and the second—section 182—is a conspiracy provision unrelated to the questions presented in the petition for writ of certiorari. Therefore, the dismissal of the charges is immaterial to the questions presented here. Section 8685.6, which the trial court did not dismiss, is sufficiently broad to encompass all questions presented in the petition, for this provision makes it unlawful to "sell or possess for sale" certain species "taken in California waters by the use of a gill net." The provision thus prohibits not only sales of fish off the reservation, but also the *possession* for sale

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[6]Section 2002 makes it a *misdemeanor* to possess certain species of fish taken in violation of California law, and section 8685.6 makes it a *felony* to sell or possess for sale certain species taken in California waters by the use of gill nets. Since both provisions apply here, California's failure to appeal the denial of the lesser included offense is immaterial.

of fish unlawfully *taken* from navigable waters in which California has sovereign interests. Therefore, the Superior Court's denial of the additional charges is wholly immaterial here.[7]

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[7]The respondent also asserts that the petition contains "deliberate omissions, mischaracterizations and outright misstatements . . . ," Res. Br. 12, which is surprising since the People filed a Supplemental Brief to accommodate the respondent's perception of the material issues here. The People strongly oppose any suggestion that the petition is misleading or inaccurate in any way.

The respondent also states that the California Court of Appeal denied the People's motion to obtain judicial notice of the two documents appended to the petition, and suggests that the denial "might have been" on grounds that California law limits the reviewing court to the record before the lower court. Res. Br. 8. The respondent omits the crucial fact that California law expressly authorizes appellate courts to take judicial notice of materials that were not introduced before lower courts, Cal. Evidence Code §§ 452, 459, and even to "liberally" take additional evidence in non-jury cases, as here, Cal. Code of Civ. Proc. § 909. Further, the Court of Appeal apparently denied judicial notice only because the materials were irrelevant to the narrow issue on which the court affirmed the conviction, *i.e.*, the off-reservation sale issue. The People then filed a new judicial notice motion in the California Supreme Court, and the Court failed to rule on the motion even though it reversed the conviction.

This background is of course immaterial in this proceeding. This Court has the right to take judicial notice of official governmental documents, see Rule 803(8), Federal Rules of Evidence, and in fact has often considered official governmental documents that were not introduced in lower proceedings. See, *e.g.*, *Mattz v. Arnett*, *supra*, 412 U.S. at 486, & nn. 4, 5, 6; 488, & nn. 7, 8; 490, & n. 10; 491, & nn. 12, 13; 496, & n. 18; 499, & n. 21.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court grant the petition for writ of certiorari.

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